The Central Law Journal.

ST. LOUIS, JANUARY 7, 1887.

CURRENT EVENTS.

A MERRY CHRISTMAS AND A HAPPY NEW YEAR.—We hope we are not belated in offering to our readers the compliments of the season. Our publication days unfortunately did not fall within the festive period, but as good wishes, like most other good things, are always in order, we take the liberty of tendering our respects, *nunc pro tunc*.

We do this with the more confidence, as our efforts to please our readers have met with such unmistakable approval. So far as we have been able to ascertain, the management of the JOURNAL has given entire satisfaction to its subscribers. In the language of Mr. Webster, "the past at least is secure," but with that we are not content. We will use our utmost exertions to render the paper still more acceptable and interesting to its readers, and more worthy of the liberal patronage which it has heretofore received.

The general plan of the JOURNAL is, of course, well-known to its readers. We furnish every week a very full, carefully prepared, and comprehensive digest of the most select and important of the recent decisions of all the courts of the last resort. In each number we publish in full one, two, and sometimes three cases, carefully selected and annotated by experienced writers, more accurately and exhaustively than those published by any other legal journal on either side of the water.

These features of our JOURNAL, we think, render it an efficient, and decidedly preferable substitute for any or all of the numerous "Reporters" that have sprung up throughout the country. Life is too short for a busy practitioner to wade through the great mass of decisions ground out daily by nearly fifty courts of the last resort throughout the United States. What the busy lawyer needs is a law journal that will relieve him of that drudgery. This the CENTRAL does, and proposes to do by winnowing the immense mass of legal matter, throwing out the chaff and presenting the valuable portion in an available form. And whenever the matter which we furnish on any particular topic is not sufficiently full to answer the purposes of the reader, he will always find a distinct reference to the full case published elsewhere, which he can obtain with but little expense.

Besides all this, in our department of "Current Events" we furnish our readers with editorial comments on matters of general professional interest; in that of Notes of Recent Decisions with abstracts of current leading cases with notes and comments; and in our "Leading Articles" with original essays by contributors of ability, learning and experience on subjects of interest to the practitioner. These departments alone are worth the subscription price of the JOURNAL, and in this connection we may add that the CENTRAL LAW JOURNAL, in our judgment, furnishes more *good* matter for less money than does any other legal journal whatever.

THE LIBERTY OF THE PRESS — AND THE ABUSE OF IT.—We learn from a recent newspaper that Mr. Gladstone, Cardinal Manning, the Archbishop of Canterbury, and other gentlemen of distinction, have requested the newspapers of London to discontinue the practice of publishing the details of the testimony in divorce and criminal trials. It is not a little discreditable to the press, and, still more to the law, and to its administration that such a request from persons of such distinction, or indeed from anybody else, should become necessary, or appropriate. The law should speak on this subject in a voice potential and mandatory. The reports of recent divorce trials in England have been as distinctly "obscene literature" as anything which ever called out for its suppression the powers of the police. The newspapers should not be *requested* to abstain from the publication of such matter; they should be *forbidden*, and disobedience should be followed by condign punishment. If the law is not strong enough, it should be made stronger, and its enforcement should be made the special duty of the proper officers of the law.

We have the highest respect for the liberty of the press—and an abhorrence not less vivid of its abuse. It is not the liberty of the press, but an undoubted abuse of it to publish in detail matters occurring in a court

of justice, which, emanating from any other source would, under existing laws, subject the publisher to heavy penalties, and severe punishment.

The reform is not less needed on our side of the water, and if possible there is even less excuse for the practice here than in England. The plea that courts are open, and the public entitled to know every thing that takes place within them, does not apply in this country, with reference to English courts. We need not care whether in England divorce trials are conducted with closed doors or not, it is no affair of ours. There is even less excuse for our newspaper press than for that of England, and yet almost every newspaper in the country has recently had column after column of cablegrams setting forth in detail, testimony tending to show that a husband or wife has been faithless, and how, and why, and when, and where, and all about it. There is manifestly a need of some careful, but stringent legislation on this subject.

NOTES OF RECENT DECISIONS.

CONDITIONAL SALES — PURCHASER FROM VENDEE—WHERE NO TITLE PASSES.—The Supreme Court of the United States has recently laid down the law on the subject of conditional sales.[1] The vendor, a manufacturer of steam engines and saw-mills, seems to have had very little faith in the vendee, or any body else, and by the terms of the contract seems to have exhausted the vocabulary of caution, and multiplied conditions and penalties to a degree hitherto unparalleled; indeed, as far as human ingenuity could effect it, he "took a bond of Fate." Nevertheless, the vendee failed to come to time, and sold the engines and saw mills to a purchaser, from whom the original vendor sought to recover the value of the property so sold.

The supreme court adopts Lord Blackburn's rules: "1, that where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; 2, that where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property.[2] A third rule, as formulated by Mr. Benjamin, is also cited with approval. Mr. Benjamin says: "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."[3]

This rule is very generally applied in cases of sales at auction.[4] And in the very common case of sales upon installments the same principal has been held in England.[5] In this connection the court remarks, that although these cases are supported by local custom and usage they nevertheless show that the intention of parties will be sanctioned when it is not contrary to the policy of the law. The policy of the English bankruptcy law is to regard as the owner of chattels one who has them in his "possession, order or disposition," and hence a vendor could not set up a conditional sale against the assignee in bankruptcy of his vendee.[6] Apart, however, from any complication with the bankruptcy laws, the principle is fully established in England in conformity with the rules already cited from Lord Blackburn and Mr. Benjamin.

In America, too, it is well settled that if the parties agree that the title shall not pass until the condition be fulfilled, the law will respect their intention, always provided that such agreement contravenes no statute of the State.[7] In the last cited case, the court holds that a sale and delivery of goods on condition that the title shall not vest until

[1] Harkness v. Russell, 7 S. C. Rep. 51.

[2] Blackb. on Sales, 152.

[3] Benj. on Sales, (2d ed.) 236; Id. (3d ed.) § 320. The author cites for this proposition Bishop v. Stillito, 2 Barn. & Ald. 329, note *a;* Brandt v. Bowlby, 2 Barn. & Adol. 932; Barrow v. Coles, (Lord Ellenborough,) 3 Camp. 92; Swain v. Shepherd, (Baron Parke,) 1 Moody & R. 223; Mires v. Solebay, 2 Mod. 243.

[4] Lament v. Duval, 9 Q. B. 1030.

[5] *Ex parte* Crawcour, L. R. 9 Ch. Div. 419; Crawcour v. Salter, L. R. 18 Ch. Div. 30.

[6] Holroyd v. Gwynne, 2 Taunt. 176; Horn v. Baker, 9 East. 215.

[7] Hussey v. Thornton, 4 Mass. 404; Marston v. Baldwin, 17 Mass. 606; Barrett v. Pritchard, 2 Pick. 512; Coggill v. Hartford, etc. Co., 3 Gray, 545; Sargeant v. Metcalf, 5 Gray, 306; Deshon v. Bigiow, 8 Gray, 159; Whitney v. Eaton, 15 Gray, 225; Herschorn v. Canney, 98 Mass. 149; Chase v. Ingalls, 122 Mass. 381.

payment be made, passes no title to the vendee, and the vendor can reclaim them against creditors or purchasers without notice of the condition. "The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose."

The cases cited, it will be observed, are all Massachusetts cases. The same doctrine prevails in Connecticut.[8] In New York, the rule is the same,so far as relates to the vendee and his creditors, though it is not so clear as affecting a *bona fide* purchaser.[9] In several cases it was held in New York that the rule did not apply to a *bona fide* purchaser from the vendee without notice of the condition.[10] These cases are regarded by the Supreme Court of the United States as overruled by that of Ballard v. Burgett,[11] but its reasoning does not appear to us to be perfectly clear.[12] In Pennsylvania, the doctrine is that if a delivery be made to a bailee with the option of purchasing, the vendor's title may be asserted against the creditors of the bailee or purchasers from him, but if there is a sale upon condition that the title shall not pass until the are paid for, they are are subject to executions in favor of the bailee's creditors and are transferable to *bona fide* purchasers.[13]

We have not space to pursue further this interesting topic, but will conclude our present remarks by saying that, in the absence of express statutory provisions, the rules stated by Lord Blackburn and Mr. Benjamin, and followed by the court in the case under consideration, are in full accord with legal principles and supported by abundant authority.

[8] Forbes v. Marsh, 15 Conn. 384; Hart v. Carpenter, 24 Conn. 427.

[9] Haggerty v. Palmer, 6 Johns. Ch. 437; Strong v. Taylor, 2 Hill, (N. Y.) 326; Herring v. Hoppock, 15 N. Y. 409.

[10] Smith v. Lynes, 1 Seld. 41; Wait v. Green, 35 Barb. 585; s. c. 36 N. Y., 556.

[11] 40 N. Y. 314. See also Cole v. Mann, 62 N. Y. 1; Bean v. Edge, 84 N. Y. 510.

[12] See Dows v. Kidder, 84 N. Y. 121; Parker v. Baxter, 86 N. Y. 586; Farwell v. Importers, etc. Bank, 90 N. Y. 483.

[13] Chamberlain v. Smith, 44 Penn. St. 431; Rose v. Story, 1 Penn. St. 190; Martin v. Mathiott, 14 Serg. & R. 214; Haak v. Lindermann, 64 Penn. St. 499.

IRREGULAR INDORSEMENT BY THIRD PERSON—CHARACTER OF THE LIABILITY ASSUMED.

If a person who is neither the maker nor payee of a negotiable promissory note, payable on time or on demand, indorses it in blank, before its delivery to the payee, and for the purpose of lending faith and credit to the instrument and making it acceptable to the payee, what is the character of the liability which he assumes? The conflict of the authorities upon this point is too wide and too deeply settled to make any reconciliation possible, except through the intervention of statutes. No less than four distinct views have been presented, and each has been urged with able and forcible reasoning. It is impossible to say where the truth lies; and as each State manifests a fixed intention to abide by the rule established by its own courts, it is vain to hope for any ultimate harmony of the decisions. The different theories can merely be placed side by side and contrasted.

The first view—and this prevails in more than half the States—is that the person so indorsing becomes liable as a joint-maker of the note, exactly the same as if his signature appeared below that of the maker at the foot of the paper, and, consequently, that he is not entitled to notice or protest, and should be sued in a joint action with the maker.[1] This

[1] Massachusetts: Essex Co. v. Edmands, 12 Gray, 273; Benthall v. Judkins, 13 Met. 265; Union Bank v. Willis, 8 Met. 504; Bryant v. Eastman, 7 Cush. 111; Riley v. Gerrish, 9 Cush. 104; Austin v. Boyd, 24 Pick. 64; Way v. Butterworth,108 Mass. 509. New Hampshire: Currier v. Fellows, 27 N. H. 366; Martin v. Boyd, 11 N. H. 385. Maine: Adams v. Hardy, 32 Me. 339; Colburn v. Averill, 30 Me. 310; Malbon v. Southard, 36 Me. 147; Childs v. Wyman, 44 Me. 433; Woodman v. Boothby, 66 Me. 389. Vermont: Flint v. Day, 9 Vt. 345; Nash v. Skinner, 12 Vt. 219. Rhode Island: Perkins v. Barstow, 6 R. I. 505. Delaware: Massey v. Turner, 2 Houst. 79; Gilpin v. Marley, 4 Houst. 284. New Jersey: Chaddock v. Vanness, 35 N. J. L. 517. Maryland: Schley v. Merrit, 37 Md. 352; Norris v. Despard, 38 Md. 491; Watz v. Alback, 37 Md. 404. Virginia: Comm. v. Powell, 11 Gratt. 828. West Virginia: Burton v. Hansford, 10 W. V. 470. North Carolina: Hoffman v. Moore, 82 N. C. 313; Baker v. Robinson, 63 N. C. 191. South Carolina: Carpenter v. Oaks, 10 Rich. 17. Georgia: Quinn v. Sterne, 26 Ga. 223. Mississippi: Thomas v. Jennings, 5 Sm. & Mar. 627. Missouri: Lewis v. Harvey, 18 Mo. 74; Perry v. Barset, 18 Mo. 140; Powell v. Thomas, 7 Mo. 440; Mammon v. Hartman, 51 Mo. 168; Baker v. Block, 30 Mo. 225. Michigan: Wetherwax v. Paine, 2

theory proceeds upon the following reasoning: he certainly means to pledge his responsibility in some way, and to the payee; he cannot be considered a first indorser of the note, because no one but the payee can occupy that position;[2] neither can he be regarded as the second indorser, because, to bring about that effect, he must appear on the face of the paper to stand in the relation of an assignor, and to have given currency to the paper by his transfer of it for a valuable consideration.[3] Nor is it possible to treat him as a guarantor of the note, for that would import a separate consideration which is not assumed in the case.[4] We are thus brought, by the exclusion of every other hypothesis, to the necessity of holding him as an original promisor jointly with the maker of the note. But it is generally held, in those States which adopt this doctrine, that parol evidence is admissible to show that it was the contemporaneous and mutual understanding of all the parties to the transaction that he should be held liable only as an indorser and not as an original promisor, and in that case he would be entitled to notice and protest.[5] It is stated, however, that this permission will be accorded only as between parties who are entitled to look into the original transaction; that such proof cannot be admitted against one who took the note before it was due, in the usual course of business, for value, and without notice.[6] In Massachusetts and Minnesota, however, it is held that no evidence can be received to change the character of his liability as a joint-maker, and that neither parol proof, nor a mortgage, given with the note to secure its payment, is admissible to show that he was to be bound only as an indorser.[7] And the fact that he agrees with the maker to be simply surety for the latter will not alter his attitude toward the payee.[8] But it appears that he will not be liable as a joint-maker if the payee afterwards indorses his own name above the stranger's, before the note is delivered; in that case he merely becomes a second indorser.[9] In Massachusetts, it is now provided by statute[10] that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorers;" which will take that State hereafter out of the category of those holding this doctrine.

The view just presented is also definitely established as the rule of the federal courts. In the language of Mr. Justice Clifford: "Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers, for the reason that they are not payees; and no party but the payee of the note can be the first indorser, and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but if he desire to do so he must employ proper terms to signify that intention, the rule being that a blank indorsement supposes that there are no such terms employed, and that he is liable either as promisor or guarantor. * * * But if anyone not the payee of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note, and below that of the maker; that is to say, he is held as a joint-maker, or as a joint and several maker, according to the form of the note."[11] And the circuit courts will follow this construction, holding that for them the question is one of general commercial

Mich. 555; Herbage v. McEntee, 40 Mich. 337; Moynahan v. Hanford, 42 Mich. 330. Minnesota: Robinson v. Bartlett, 11 Minn. 410; Peckham v. Gilman, 7 Minn. 446; McComb v. Thompson, 2 Minn. 139; Marienthal v. Taylor, 2 Minn. 147. Colorado: Kiskaddon v. Allen, 7 Col. 206; Good v. Martin, 2 Col. 218. Oregon: Barr v. Mitchell, 7 Oreg. 346

[2] Good v. Martin, 95 U. S. 90.

[3] Martin v. Boyd, 11 N. H. 385.

[4] But when he is held as joint maker, the consideration moving to the original party is the consideration for his undertaking; nor is the fact altered by proof that he did not actually participate in such consideration: Good v. Martin, 2 Col. 218.

[5] Lewis v. Harvey, 18 Mo. 74; Seymour v. Farrell, 51 Mo. 95; Mammon v. Hartman, 51 Mo. 168; Cahn v. Dutton, 60 Mo. 297; Barrows v. Lane, 5 Vt. 161; Sylvester v. Downer, 20 Vt. 355; Owings v. Baker, 54 Md. 82; Rey v. Simpson, 22 How. 341.

[6] Schneider v. Schiffman, 20 Mo. 571.

[7] Essex Co. v. Edmands, 12 Gray 273; Wright v. Morse, 9 Gray 337; Peckham v. Gilman, 7 Minn. 446.

[8] Perkins v. Barstow, 6 R. I. 505.

[9] Clapp v. Rice, 13 Gray, 403.

[10] Mass. Stat. 1874, ch. 404; Nat'l Bank v. Law, 127 Mass. 72.

[11] Good v. Martin, 95 U. S. 90; Rey v. Simpson 22 How. 341.

law, and that the decisions of the State courts, though entitled to the highest respect, are not to be followed as authorities unless agreeing with the decision above quoted, which case is regarded as conclusively settling the doctrine for the federal courts.[12] The anomalous state of affairs which will follow upon this course is apparent at a glance. For example, a citizen of New York, who indorses a note in this way, will be an indorser when brought into the courts of that State, but an original promisor if he can be sued in the circuit court. Or, supposing him to have had no notice of non-payment, he will be liable in the federal courts, but not in the courts of his own State. However, since the supreme court has adopted a definite rule of construction, it is evidently better that those courts over which it has an appellate jurisdiction should follow the same rule than that they should conform to the practice of the particular State where they happen to be sitting.

The second view is, that a third party indorsing a note in blank before delivery to the payee enters into the original contract of the maker of the note as a co-maker, but in the character of surety or guarantor. And this opinion obtains principally in Louisiana, Texas, and Arkansas.[13] It is founded upon the theory that the place of signature, and the general import of the note indicate an intention to become responsible as surety for the maker, while, for the reasons already given, the person so signing cannot properly be regarded as an indorser. But here, also, it is generally held that evidence is admissible to show that a different obligation was designed to be assumed.[14]

The third view is the one maintained in Illinois, Kansas, California, and Connecticut; that the person so signing assumes the responsibility of a guarantor pure and simple; that his liability is only secondary, and cannot be fixed except by proof that the remedies against the maker have been exhausted; but that he is not generally entitled to notice unless injury be shown to have resulted from the want of it. This doctrine is supported in several important cases.[15] But again we find the courts permitting him to rebut the presumption that he put his name on the note as guarantor, by showing the true character of his obligation.[16]

Finally, the doctrine entertained in New York, Pennsylvania, Wisconsin, and in a few cases elsewhere, is as follows: Taking the note as it stands, and without any extrinsic proof of the intention of the parties, the person who indorses in blank before delivery to the payee is to be regarded as a second indorser. In this capacity he is not liable to the payee at all; nor is he liable to any subsequent holder for value, unless the payee complies with the implied condition of his signature by writing his own name above that of the blank indorser, and thus assuming the place and responsibilities of a first indorser. But parol evidence is admissible to show that the object designed to be attained by the addition of the stranger's indorsement was to give the note faith and credit, and render it acceptable to the payee; and this may also be shown by the stranger's express acknowledgment of that fact to the payee. With this extrinsic light upon the contract. he will assume the position of first indorser, the payee being second. Thus, he becomes liable to the payee (but only upon receiving all the rights of a regular indorser), and also, in like manner, to any subsequent indorsee of the payee.[17] As remarked by

[12] National Bank v. Lock-Stitch Fence Co., 24 Fed. Rep. 221; s. c., 20 Reporter, 235; Miller v. Ridgely, 22 Fed. Rep. 889.

[13] McGuire v. Bosworth, 1 La. Ann. 248; Penny v. Parham, 1 La. Ann. 274; Chorm v. Merrill, 9 La. Ann. 533; Syme v. Brown, 19 La. Ann. 147; Collins v. Trist, 20 La. Ann. 348; Cook v. Southwick, 9 Tex. 615; Carr v. Rowland, 14 Tex. 275; Chandler v. Westfall, 30 Tex. 477; Killian v. Ashley, 24 Ark. 212; McGee v. Connor, 1 Utah, 92; Nathan v. Sloan, 34 Ark. 524; Heise v. Bumpass, 40 Ark. 545.

[14] Cook v. Southwick, 9 Tex. 615.

[15] Camden v. McKay, 3 Scam. 437; Carroll v. Weld, 13 Ill. 682; White v. Weaver, 41 Ill. 409; Blatchford v. Milliken, 35 Ill. 434; Parkhurst v. Vail, 73 Ill. 343; Glickauf v. Kauffman, 73 Ill. 378; Boynton v. Pierce, 79 Ill. 145; Eberhart v. Page, 89 Ill. 550; Firman v. Blood, 2 Kans. 496; Fuller v. Scott, 8 Kans. 25; Riggs v. Waldo, 2 Cal. 485; Pierce v. Kennedy, 5 Cal. 138; Crooks v. Tully, 50 Cal. 673; Ranson v. Sherwood, 26 Conn. 437; Holbrook v. Camp, 38 Conn. 23; Van Doren v. Tjader, 1 Nev. 380; Harding v. Waters, 6 Lea (Tenn.) 324.

[16] Carroll v. Weld, 13 Ill. 682.

[17] Cottrell v. Conklin, 4 Duer, 45; Gilmore v. Spies, 1 Barb. 158; Spies v. Gilmore, 1 N. Y. 321; Waterbury v, Sinclair, 26 Barb. 455; Paine v. Noelke, 45 N. Y. Super. Ct. 176; Phelps v. Vischer, 50 N. Y. 69; Coulter v. Richmond, 59 N. Y. 478; Barto v. Schmeck, 28 Pa. St. 447; Schollenberger v. Nehf, 28 Pa. St. 189; Eilbert v. Finkbeiner, 68 Pa. St. 243; Arnot v. Symonds, 85 Pa. St. 99; Taylor v. McCune, 11 Pa. St. 460; Heath v.

Church, C. J.: "As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee."[18] But it is *not* competent to show by parol that it was the intention to hold him liable as a joint-maker.[19]

The courts of Indiana, although they hold that the presumptive liability of one signing a note in this irregular fashion is that of an indorser (in harmony with the view last set out), yet permit parol evidence to show that the mutual understanding of the parties at the time of the transaction was that he should be held as a maker or surety.[20] At least a note thus indorsed is admissible evidence in a suit by the payee against such indorser and the maker, as joint-makers, as a link in the chain of the plaintiff's evidence.[21] And in Ohio, it is thought that if the undertaking of the third party *can* be made to take effect as an indorsement, it should always be held to do so, as conforming more nearly to the general intention of parties assuming that position upon it. Hence, if the note is not designed for the payee, and it is contemplated that the latter should indorse it as an accommodation party before it is used, then he who indorsed it at the time, or before, the note was drawn should be treated as a second indorser.[22]

If there is no date appended to the signature of the irregular indorser, nor anything to show when it was put on, it will be presumed that he added his name at the inception of the note and before its delivery, or (what is equivalent) that he did so afterwards in pursuance of a previous agreement.[23] But parol evidence is admissible to rebut this presumption and to show that he did not sign the instrument until after it had taken effect as between the maker and the payee, and, succeeding in this, he will change his liability from that of an original promisor to that of a guarantor.[24] It is said, however, in one case, that in favor of the original payee there is no presumption that the indorsement was before delivery; the fact must be proved; but it is otherwise in favor of a subsequent *bona fide* holder.[25]

In Minnesota, it is held—and probably in all those States where a person so signing is regarded as an original promisor—that when the signature before delivery is proved, there arises a presumption, in the absence of evidence to the contrary, that the indorsement was made for the purpose and with the effect of giving additional credit to the note with the payee.[26] But, as we have already seen, in New York and Pennsylvania it is directly the reverse—it is necessary to *prove* that such was the intention of the indorser in order to make him liable to the payee at all.

One who indorses a note that is *not* negotiable, as security, before delivery to the payee, cannot be charged as an indorser of the note; becuse there is no such thing as an "indorsement," speaking in the strict commercial sense, of non-negotiable paper; he will therefore be liable to the payee as maker or guarantor.[27] Or, as stated in Connecticut, he contracts that the note is due and payable according to its tenor, that the maker shall be able to pay it when it comes to maturity, and that it is collectible by the use of due diligence.[28] Of course if the note is payable to the maker or his order, the person so signing it is simply an indorser.[29]

H. Campbell Black.

Williamsport, Pa.

VanCott, 9 Wis. 516; Davis v. Barron, 13 Wis. 227; Fear v. Dunlap, 1 Greene (Iowa), 331; Chambers v. McMurdo, 5 Munf. 252.

[18] Coulter v. Richmond, 59 N. Y. 478; Moore v. Cross, 19 N. Y. 227.

[19] Heath v. Van Cott, 9 Wis. 516.

[20] Kealing v. Vansickle, 74 Ind. 529; Roberts v. Masters, 40 Ind. 460. But see Cecil v. Mix, 6 Ind. 478; Nurre v. Chittenden, 56 Ind. 462.

[21] Earley v. Foster, 7 Blackf. 35.

[22] Greenough v. Smead, 3 Ohio St. 415; Seymour v. Mickey, 15 Ohio St. 515. And see Robinson v. Abell, 17 Ohio, 36.

[23] Colburn v. Averill, 30 Me. 310; Childs v. Wyman, 44 Me. 433; White v. Camp, 1 Branch, 94; Carr v. Rowland, 14 Tex. 275; Benthall v. Judkins, 13 Met. 265.

[24] Way v. Butterworth, 108 Mass. 509.

[25] McComb v. Thompson, 2 Minn. 139.

[26] Marienthal v. Taylor, 2 Minn. 147.

[27] Griswold v. Slocum, 10 Barb. 402; Richards v. Warring, 39 Barb. 42; Houghton v. Ely, 26 Wis. 181; Barr v. Mitchell, 7 Oreg. 346.

[28] Perkins v. Catlin, 11 Conn. 213.

[29] DuBois v. Mason, 127 Mass. 37.

CRIMES — THEIR JURISDICTION AS AFFECTED BY COUNTY LINES.

Our laws everywhere go upon the theory, that crimes are local and ought to be punished only by the State whose laws have been violated.[1] For that purpose the United States is regarded, so far a foreign State that, State courts will not punish offenses against its laws.[2] But if an act is a crime against both the national and State laws, the State will punish the act, so far as it is an offense against its own law.[3]

As a general rule, the venue in an indictment must be laid in the county where the offense was committed.[4] However, if the court has jurisdiction over offenses in only a part of the county, the indictment must show that the offense was committed in that part, so that the court may know it has jurisdiction of the place.[5] Place is only essential on a question of jurisdiction.[6] If the place where a crime was committed has been created into a new county after its commission, the courts of the new county have jurisdiction.[7] The legislature may divide a county into judicial districts and provide that the grand jury for each court may be drawn from its district, instead of from the county.[8] And where unorganized counties are attached to an organized county for judicial purposes, an indictment by grand jurors selected from all the counties will be valid.[9] The jurisdiction of courts and the venne of actions are proper subjects of legislation.[10]

Venue has always been regarded as a matter of substance in criminal trials; and, at common law, an offense commenced in one county and completed in another could not be tried in either county.[11] But at a very early date many exceptions were introduced covering cases where crimes were committed partly in one county and partly in another.[12] Where property stolen in one county is taken by the thief to another county, he may be prosecuted in either.[13] So if the offense is begun in one county and consummated in another, it may be punished where it was consumated, or where the principal act was done.[14] Where a mortal blow was feloniously given in one State, producing death in another State, the offender may be convicted of murder in the State where the blow was given.[15] And where a mortal blow is given in one county and death ensues in another, the murderer may be prosecuted in either county.[16] So a forgery in another State of titles to lands in Texas is punishable in the latter State, when an overt act is committed there.[17] So altering in one State a deed which had been forged in another, is punishable in the former State.[18] The Texas code giving either county jurisdiction of an offense committed within 400 yards of the boundary is, as to theft, controlled by the provision allowing a prosecution in any county into which the property was taken.[19] Counties bordering on a navigable river have concurrent jurisdiction over crimes committed on the river opposite such counties, below low water mark.[20] The fact that the vessel on which the crime was committed is moored to the opposite shore, will not alter the rule.[21]

[1] Rorer on Inter-State Law, 227; 1 Bish. Cr. L., § 79; Com. v. Uprichard, 3 Gray, 434.

[2] Telegraph Co. v. First Nat. Bk., 74 Ill. 217.

[3] Rorer on Inter-State Law, 216.

[4] People v. Mather, 21 Am. Dec. 122, 143; 4 Wend. 229; Moody v. State, 7 Blackf., 424.

[5] McBride v. State, 10 Humph. 615; Field v. State, 34 Tex. App. 39; State v. Egan, 10 La. Ann. 698; State v. Cotton, 24 N. H. 143. See Wickham v. State, 7 Coldw. 525.

[6] Hikes v. Com., 26 Pa. St. 519; State v. Harden, 1 Brev. (S. C.) 47; 1 Bish. Cr. L., § 228.

[7] Drake v. Vaughn, 6, J. J. Marsh, 147; Walker v. State, 16 Tex. App. 200; Murrah v. State, 51 Miss. 675; McElroy v. State, 13 Ark. 708; State v. Jones, 3 Halst. 307; State v. Strathman, 4 Mo. App. 583; 1 Bish. Cr. L., § 191. See State v. Hart, 4 Ired. L. 222; People v. McGuire, 32 Cal. 140; Jordan v. State, 22 Ga. 545.

[8] Alfred v. State, 37 Miss. 296; State v. Williams, 29 La. Ann. 779.

[9] Minnesota v. Stokely, 16 Minn. 282.

[10] Kingsbury v. Chatham R. R. Co., 66 N. C. 284.

[11] State v. Moore, 59 Am. Dec. 354; 26 N. H. 448.

[12] 4 Blackst. Com. 303.

[13] 4 Blackst. Com. 303; 1 Bish. Cr. L., § 105, 110; Mack. v. People, 82 N. Y. 235.

[14] Com. v. Linton, 2 Va. Cas. 205; Nash v. State, 2 Greene, 286.

[15] U. S. v. Giteau, 1 Mackey, 498; Green v. State, 41 Am. R. 744; 66 Ala. 40. See State v. McCoy, 41 Am. Dec. 301; State v. Foster, 58 Am. Dec. 678; Com. v. Parker, 2. Pick. 550; Dula v. State, 8 Yerg. 511.

[16] State v. Pauly, 12 Wis. 537.

[17] Hanks v. State, 13 Tex. App. 289; *Exp.* Rogers, 38 Am. R. 654; 10 Tex. App. 655.

[18] Lindsay v. State, 38 Ohio St. 507.

[19] Cameron v. State, 9 Tex. App. 332.

[20] Carlisle v. State, 32 Ind. 55; State v. Timmons, 4 Minn. 325. See Steerman v. State, 10 Mo, 503; People v. Tyler, 74 Am. Dec. 703.

[21] State v. Plants, 52 Am. R. 211; 25 W. Va. 119; State v. Mullen, 35 Iowa, 199.

While it is generally conceded that a change of the place of trial may be granted at the instance of the defendant, on account of prejudice or other good cause, the State cannot have a change, against the will of the defendant.[22] Where a statute authorized the grand jury of the county, to inquire of offenses committed in another county in the same circuit when the judge of the circuit directed them to do so, because of his belief that there was such prejudice on the part of the people of the county where the crime was committed, as prevented the offenders from being indicted the act was declared to be unconstitutional, as being an invasion of defendant's right to trial by a jury of the vicinage.[23] So if murder be committed in R county, but within 500 yards of the line between it and C county, the murderer cannot be indicted in C county, even though there be a statute authorizing the courts of either county to indict and try all offenses that are committed on or within 500 yards of the boundary line.[24] The statute, so far as it attempts to confer jurisdiction on the court of C county, because the offense was committed near the line, is unconstitutional, since it authorizes the jury to be taken from a county other than the one in which the offense was committed.[25] So an act authorizing the institution of a prosecution in a county in a distant part of the State from that where the offense was alleged to have been committed, is unconstitutional, as being oppressive and an invasion of his right of trial before a jury of the vicinage.[26]

On the other hand, a statute providing that an offense committed on board of a vessel, during the course of a trip, might be punished in any county through which the vessel passed on that trip, was sustained as a valid enactment.[27] Legislative acts determining the place in a State where an offense shall be prosecuted are not to be construed strictly, as it is a matter of little consequece to the party in which county he may be arraigned;[28] yet, where an act authorizes criminal proceedings in a county other than that in which the crime was actually committed, it will be given that interpretation which conforms most nearly to the common law rule.[29]

A statute allowing offences committed within one hundred rods of the boundary line of two counties to be prosecuted in either county, does not conflict with a section of the constitution which provides that trials for criminal offenses shall be by a jury of the county wherein the crime was committed.[30] The indictment, found in A county, may allege that the crime was committed in B county, "but within one hundred rods, etc., of A county."[31] So it was held in Massachusetts, under a similar statute, that the complaint might charge the offense to have been committed in the county where the prosecution was begun, although in fact it was committed across the line in the other county, the variance being immaterial.[32] So, in New York, a similar statute was sustained; and it was held that the indictment might state that the offense had been committed in the other county, but within five hundred yards of the county line.[33] So, where the point at which a fight occurred was within one hundred and twenty-five yards of a church in W county, it was held, under a Texas statute, that the venue was properly laid in W county, notwithstanding the fight actually took place in the adjoining county.[34]

A convict is, in contemplation of law, in the penitentiary, although he may be hired out; and he may be indicted and tried in the county where the penitentiary is located for murder committed in another county.[35] Where the court is in doubt as to which of two counties an offense was committed in, it may instruct the jury to find that it was in the county in which the indictment was found.[36]

As there is a direct conflict between the decisions as to the constitutionality of acts conferring concurrent jurisdiction upon the courts of both counties over offenses com-

22 Kirk v. State, 1 Coldw. 344; State v. Denton, 6 Coldw. 539; Osborn v. State, 24 Ark. 429; State v. Howard, 31 Vt. 414; Wheeler v. State, 24 Wis. 52.

23 *Exp.* Slater, 72 Mo. 102.

24 *Exp.* McDonald, 19 Mo. App. 370.

25 *Exp.* McDonald, *sup.*; Armstrong v. State, 1 Coldw. 338.

26 Swart v. Kimball, 11 C. L. J., 71; 43 Mich. 443.

27 People v. Hulse, 3 Hill, 309; Larkin v. People, 61 Barb. 226; Nash v. State, 2 Greene, 286.

28 1 Bish. Cr. L., § 228.

29 People v. Hulse, *sup.*

30 State v. Robinson, 14 Minn. 449.

31 State v. Robinson, *sup.* See State v. Alviso, 55 Cal. 230.

32 Com. v. Gillon 2 Allen, 502.

33 People v. Davis, 56 N. Y. 95.

34 Willis v. State, 10 Tex. App. 493.

35 Ruffin v. State, 21 Gratt. 790.

36 State v. Grable, 47 Mo. 350. *Contra*: State v. Rhoda, 23 Ark. 155. See People v. Alviso, 55 Cal. 230.

mitted on the county line, or within specified distances of the dividing line, between such counties, it may not be amiss to summarize the arguments *pro* and *con* on this point. The arguments against the constitutionality of such acts are as follows: The word "indictment" had, at the common law, a well defined meaning—a fixed and determinate signification; that it signified an accusation preferred against an individual by a grand jury, charging him with the commission of a crime; that a grand jury was a body of men (not less than twelve in number), impanelled and sworn according to law; that the grand jurors must be taken from the body of the county where the court sits; that they are charged to inquire, and under their oath, could only inquire of offenses committed in that county and not elsewhere; and that as an individual could only be indicted by a grand jury of the county where the offense was committed, and not elsewhere, venue was a matter of substance in a criminal proceeding, indicating the place of accusation as well of trial. It is further argued, that the technical meaning of the term "indictment," at common law, was well known to the framers of those constitutions, and that when they inserted that word in the constitution they intended it to have its technical meaning; and that it must be read and understood as though its common law incidents were expressly named and specified in the constitution; and that where the constitution provides that persons charged with a felony can only be proceeded against by indictment, it is meant that the accusation must come from a grand jury, and that the grand jury must come from the county or vicinage in which the offense was committed; and that as the right to these common law incidents are secured to the accused by the constitution, it is beyond the power of the legislature to deprive the accused of them; that if the legislature can deprive him of one of these incidents it can deprive him of all; that if the legislature can extend the jurisdiction of a court in one county over the line into another county one hundred rods, then it can do it any other distance, and thus deprive the accused of a right of accusation and trial by and before a jury from the vicinage where the offense was committed; and that the rights of the citizen, so secured to him by the constitution, are paramount to any considerations of expediency in bringing criminals to justice.

On the other hand, it may be argued that the purpose originally sought in making offenses triable in the county where they were committed, was two fold: 1, to secure to the parties and their witnesses a convenient and accessible place of trial; 2, to secure as jurors those having such knowledge of the parties, of their witnesses, and of the facts, as would enable them the better to judge of the truth or falsity of their allegations and testimony, than could be obtained by observation, etc., during the course of a trial; but that at a very early age in the history of the common law, experience taught that the selection of jurors from the immediate vicinage, especially where they had a knowledge of the facts etc., worked badly, as they were so apt to be inflamed with prejudice or passion; and, consequently, changes were made in the common law, having for their object to procure jurors who had no knowledge of the transaction, and who were free from partisan prejudice or factional bias. Also, that whether a jury, at the common law, was to be taken from the county at large, or from a particular portion thereof, depended upon the extent of the jurisdiction of the court to which such jury was appended; that if the jurisdiction was co-extensive with the territorial limits of the county, then the jury must be taken from the county at large; otherwise, only from the district over which that court had jurisdiction; that it thus becomes apparent that jurisdiction is not dependent on county lines; that such lines are only a convenient means of describing the territorial jurisdiction of the courts; and that jurisdiction of the court—not county lines—determines the source from which the jury was to be drawn. Also, that as the same rules of evidence and of procedure obtain in all the counties in a State, and as an offense, in whichsoever county committed, is a violation of the same law and merits the same punishment; and as the same consequences must attend a conviction or acquittal in one county as in another; and as the people in one county have the same interest in upholding the law and protecting individual rights as in another; and as the jury, according to the spirit of modern criminal law, must be taken from those who are disinterested and im-

partial, and who know nothing of facts which would make them witnesses in the case, the matter of venue cannot be important or essential, so long as the place is accessible and convenient. Also, that the will of the legislature is paramount, except when in conflict with the constitution; that jurisdiction, at common law, was always regarded as a proper subject of legislation; that the constitution, although it provides for the creation of courts for the trial of crimes, does not prescribe their territorial jurisdiction, but leaves that to be fixed by the legislature; that, in the absence of a constitutional provision prohibiting a court of one county from exercising jurisdiction over persons or things in another county, acts giving the courts of adjoining counties concurrent jurisdiction over offenses committed on, or within specified distances of their borders, are a proper exercise of legislative power; that they are promotive of good government, as they prevent the escape of criminals over a technical doubt as to the exact spot where the crime was committed, or as to the precise line between the counties; that they are expedient is proved by their adoption in England as well as in all the United States; that, since such jurisdiction is conferred by a valid statute, it cannot be assailed because the jury may be drawn from a more limited territory; that there is no more reason for asserting that such acts are unconstitutional, upon the grounds stated, than there would be for questioning the constitutionality of an act conferring jurisdiction throughout a county, because, by another act, the jury was to be drawn from a township or a district in the county; and, finally, that the objections raised go to the validity of the acts relating to the drawing and impanneling of juries rather than to the act conferring the jurisdiction over the territory in the adjacent county; that if the accused is entitled to have a jury selected from the whole territory over which the court has jurisdiction, the remedy must be sought through a modification or amendment of the jury laws, instead of assailing the laws conferring jurisdiction.

CROSBY JOHNSON,

Hamilton, Mo.

ASSIGNMENT FOR BENEFIT OF CREDITORS — CHATTEL MORTGAGE — PREFERENCES — BOOK ACCOUNTS—ACCEPTANCE.

GAGE V. PERRY.

Supreme Court of Iowa, October 20, 1886.

1. An insolvent may dispose of his entire estate by chattel mortgage and partial assignment to secure particular creditors, and such conveyances will not constitute a general assignment, where they were made with the *bona fide* intention of securing the particular creditors, and not with the intention of disposing of the insolvent estate for the benefit of creditors.

2. Chattel mortgages and partial assignment to secure particular creditors, made shortly before, but not in contemplation of a deed of general assignment, are not a part of such general assignment.

3. A partial assignment to secure a creditor, delivered to a person unauthorized to receive it, does not operate as an executed instrument, and will be defeated by a general assignment executed before the partial assignment comes into the creditors' hands.

Morris and Humphreys, being an insolvent firm, were indebted to Baker, Harrod & Jones, and Briscoe was responsible for them as surety on a note to a bank. The firm executed a chattel mortgage covering its entire stock in trade to secure Baker, Harrod & Jones, and at the same time and at the instance of Jones, an assignment of its book accounts to secure Briscoe on his liability as surety. Baker, Jones and Harrod took immediate possession of the stock of goods. Within an hour after the execution of these papers, the firm executed a general assignment for the benefit of all its creditors, and Perry was the trustee in this assignment. The assignment to Briscoe was not delivered to him until after the execution of the assignment to Perry, but he immediately took possession of the books and papers and began to collect the accounts. Baker, Jones and Harrod delivered the goods to Perry. Gage and his co-plaintiffs are general creditors of Morris & Humphreys, and brought this suit to have the chattel mortgage and the assignment to Briscoe set aside as void. Further facts appear in the opinion of the court.

REED, J., delivered the opinion of the court:

The first question which we will consider is whether the chattel mortgages to Baker, Jones, and Harrod, and the assignment of the accounts to Briscoe, amounted, in effect, to an assignment for the benefit of creditors. If they did, the assignment is clearly invalid, for the reason that it was not made for the benefit of all the creditors in proportion to the amount of their respective claims. Code, § 2115. As stated above, those instructions were all executed at the same time. They covered all the assets of the firm of Morris & Humphreys, and that firm was insolvent when the instruments were executed. Baker was an employee of the firm, and the indebtedness to him was for money loaned to the firm, and for wages

due him. One member of the firm contemplated selling his interest in the business and property of the partnership. Baker knew this, and he demanded that the amount of his debt should be paid or secured before any change should be made, and the mortgage to him was given in obedience to this demand. The indebtedness to Jones was also for borrowed money. He was informed that the firm was about to secure Baker, and he insisted that his debt should also be secured, and the members of the firm accordingly consented to give him a mortgage on the merchandise in the store. Neither Harrod nor Briscoe was present at the time of the transaction, nor did they know that any of the creditors were demanding security for their debts. One Ed. Jones, a relative of Harrod, was present at the time, and knew that Baker and defendant Jones (who is his brother) were demanding security. He had been making an examination into the affairs of the firm, with the view of purchasing the interest of the partner who desired to retire, and he appears to have had a better understanding of the condition of the business of the firm than either of the partners had. He also knew of Briscee's liability as surety on the note to the bank, and he insisted that Harrod's debt should be secured, and that Briscoe should be indemnified against his liability on said note; and the mortgage to Harrod, and the assignment of the accounts to Briscoe, were executed in obedience to this demand. He did not have authority from either Harrod or Briscoe to act for them in the matter, nor did he claim to have any such authority. He, however, took possession of the mortgage to Harrod after it was executed, and claims to have taken possession of the property under it.

In determining the legal effect of the instruments, it is important to ascertain the intention with which they were executed. The creditors of Morris & Humphreys had no interest in or lien upon the property of the firm. The *jus disponendi* was in the members of the partnership. They had the legal right to pay or secure any one or more of their creditors, and their right in this respect was not at all affected by the fact that they were insolvent. Nor does the fact that the whole of their assets was devoted to the payment or security of but a portion of the debts they were owing afford any ground of complaint to those creditors whose debts were unsecured. If, then, they executed the instruments with the *bona fide* intention of securing the mortgagees, and of indemnifying Briscoe against his liability on the note to the bank, the law will not give to their act a different character from that intended. This has been the uniform holding of this court in similar cases. See Fromme v. Jones, 13 Iowa, 480; Lampson v. Arnold, 19 Iowa, 479; Farwell v. Howard, 26 Iowa, 381; Kohn v. Clement, 58 Iowa, 589; s. c., 12 N. W. Rep. 550; Cadwell's Bank v. Crittenden, 66 Iowa, 237; s. c., 23 N. W. Rep. 646. Without setting out the circumstances attending the execution of the instruments with more particularity than is done above, we deem it sufficient to say that the evidence satisfies us that the only purpose which Morris & Humphreys had in view when they executed the mortgages and assignment was the securing of the debts they were owing to Baker, Jones, and Harrod, and the indemnifying of Briscoe against liability on said note. They executed the instruments in obedience to the demands made upon them for security and indemnity, and there is no reason for supposing that they intended any other result than the creation of such security and indemnity. We think, therefore, that the circuit court erred in holding that the instruments were in legal effect an assignment for the benefit of creditors.

2. The deed of general assignment to Parry was executed within one hour after the execution of the chattel mortgages, and the assignment to Briscoe. Plaintiffs contend that the execution of all of the instruments constituted but one transaction, and that the whole transaction amounted to an assignment for the benefit of creditors, each of the instruments being part of the assignment, and that such assignment is invalid, for the reason that a preference is given to the secured creditors. This claim, however, is not sustained by the proof. The undisputed evidence is that Morris & Humphreys did not contemplate making a general assignment when they executed the other instruments, but that they determined to make an assignment when advised, after the execution of the mortgages, that the recording of those instruments would probably have the effect to cause their unsecured creditors to institute attachment suits against them. In this respect the case is similar in its facts to Perry v. Vezina, 63 Iowa, 25; s. c., 18 N. W. Rep. 657; and Farwell v. Jones, 63 Iowa, 316; s. c., 19 N. W. Rep. 241.

3. Morris & Humphreys assured Briscoe, when he became surety for them on the note to the bank, that they would protect him against the same. But there was no agreement that he was to be indemnified in any particular manner against the liability he incurred by signing it. When the assignment of the accounts was executed, it was taken possession of by Jones, the person at whose suggestion it was made. As stated above, Jones had no authority from Briscoe to act for him in the transaction. In doing what he did about the matter, he was performing a friendly act in Briscoe's behalf. But he was in no position to bind him by anything he did in the transaction. After he secured the assignment he took possession of the books in which the accounts were kept, and delivered them, together with the assignment, to Briscoe. But before this delivery was made the deed of general assignment had been executed, and the assignee had qualified and taken possession of the merchandise in the store. We are of the opinion that Briscoe acquired no rights under the assignment of the accounts. Delivery of the instrument was essential to give it validity and effect. The delivery to Jones was

not a delivery to Briscoe; for, as we have said, he had no authority to bind him by accepting it. Morris & Humphreys could not be divested of the property by the instrument until it was accepted by Briscoe. But, before such acceptance by him, they executed the deed of general assignment, and the effect of that instrument was to pass to the assignee, for the benefit of their creditors, all the property of which they were seized at the time it was executed. Code, § 2117. The case, in this respect, is governed by the rule laid down in Day v. Griffith, 15 Iowa, 104.

The facts with reference to the execution of the mortgage to defendant Harrod are the same as those with reference to the assignment to Briscoe. There was no delivery or acceptance of the mortgage until after the deed of general assignment was executed, and the assignee had qualified and taken possession of the property. Harrod therefore acquired no rights under it which can be asserted against the assignee.

On the appeal of plaintiffs, and the defendants Briscoe and Harrod, the judgment will be affirmed. On the appeal of defendants Baker and Jones it will be reversed.

NOTE.—*Essentials of an Assignment for the Benefit of Creditors.*—The phrase assignment for the benefit of creditors, is one largely used in the law, and a meaning has been attached to that phrase more or less precise. It is the object of this article to collect and arrange the authorities throwing light upon the nature and essentials of "assignments for the benefit of creditors."

A Conveyance is Essential.—A conveyance is essential to an assignment for the benefit of creditors, but the particular form of conveyance employed is not material. Any conveyance which will pass title according to the laws of the State is sufficient. A simple transfer without writing has been held sufficient.[1] The conveyance of property may be by mortgege,[2] or by confession of judgment,[3] or by a conveyance, absolute on its face.[4] An irrevocable power of attorney to collect choses in action and distribute, has been held a general assignment.[5] A lease by an insolvent railroad of its line of road to another company, in trust to distribute the rent among creditors, has been held an assignment.[6] An assignment of choses in action to an attorney in payment of certain claims represented by him, was an assignment for the benefit of creditors.[7]

In Dickson v. Rawson,[8] it was held that a conveyance by an insolvent of his effects to certain creditors, in trust to pay themselves and their other creditors, is a general assignment,[9] even though the property is only sufficient to pay the grantee.[10]

1 Brown v. Chamberlain, 9 Fla. 464; Shenbar v. Winding, 1 Cheve's L. (S. Car.) 218.

2 Hardraker v. Lerby, 4 Ohio St. 602; Bloom v. Naggle, 4 Ohio St. 45.

3 Mitchell v. Gendell, 7 Phila. 107.

4 Truitt v. Caldwell, 3 Minn. 364.

5 Britton v. Loring, 45 N. Y. 81; Watson v. Bagaley, 12 Pa. St. 164.

Bittenbender v. Sunbury, & Erie R. R. Co., 40 Pa. St.

Wallace v. Wainwright, 87 Pa. St. 263.

8 5 Ohio St. 218.

9 Truitt Bros. v. Caldwell, 3 Minn. 364; Page v. Smith, 24 Wis. 368; Com. Exchange National Bank v. Philadelphia Trust S. D. & I. Co., 11 Phila. 510.

10 Gooderich v. Downs, 6 Hill, 438; Griffin v. Barney, 2 N. Y. 365.

Immediate Conversion of Estate Not Essential.—In general, an assignment for the benefit of creditors contemplates an immediate or early conversion of the estate into money. But this would seem not to be essential. In the following cases, mortgages under which no sale could take place until default were held to constitute general assignments.[11]

Can Only be Made by an Insolvent.—A general assignment can only be made by an insolvent.[12]

Must be Voluntary.—A deed given to a creditor in consideration of extension of time cannot be an assignment for the benefit of creditors.[13]

A Trustee is Necessary.—There can be no assignment for the benefit of creditors without the intervention of a trustee to receive the legal title to the property and make the distribution among creditors.[14] But the following cases seem to hold that no trustee is necessary.[15] In the first case, the insolvent made several successive mortgages upon all his property to secure certain debts, and it was held that the object of the transaction being to effect a distribution of all the insolvent's estate among his creditors, it was an assignment for the benefit of creditors though no trustee was named.[16] The trustee must have the legal title to the property assigned.[17] The assignee must be a trustee for creditors. The trustee must be of assignor's appointing.[18]

Assignor's Property.—An assignment is not technically an assignment for the benefit of creditors, unless it includes all, or practically all, of the assignor's estate.[19] But the accidental or intentional omission of a trial portion of the estate, does not render the assignment partial.[20]

But Need Not Be for All Creditors.—It would seem that the term general, as applied to assignments, has reference rather to the proportion of the estate conveyed than to the proportion of the creditors secured.[21]

Assignment Distinguished from Mortgage and Trust Deed.—A mortgage or trust deed is given for the purpose of security, merely, and contemplates a sale only in case of a failure to pay the mortgage debt.[22] Hence, a trust deed or mortgage, even with power of sale, and though it include all assignor's estate, is not an assignment.[23] A conveyance to a single creditor to sell and

11 Bloom v. Naggle, 4 Ohio St. 45; Livermore v. McNair, 34 N. J. Eq. 478.

12 Keen v. Preston, 24 Ind. 395.

13 Johnson's Appeal, 103 Pa. St. 373.

14 Chaffees v. Risk, 24 Pa. St. 432; Henderson's Appeal, 31 Pa. St. 502; Vallance v. Miners' Life Ins. Co., 42 Pa. St. 441; Peck v. Merrill, 26 Vt. 686; Van Buskirk v. Warren, 4 Abb. App. Cas. 457; Cowles v. Ricketts, 1 Iowa, 582; Claflin v. McGlaughlin, 65 Pa. St. 492; McGregor v. Chase, 37 Vt. 225; Otis v. McGuire, 76 Ala. 235.

15 Burrows v. Lehndorff, 8 Iowa, 96; Livermore v. McNair, 34 N. J. Eq. 478.

16 Bauming v, Sibley, 3 Minn. 389.

17 Brown v. Halcomb, 1 Stock. 297; Beans v. Bullitt, 57 Pa. St. 221.

18 Caldwell's Bank v. Crittenden, 66 Iowa, 237. But see Wallace v. Wainwright, 87 Pa. St. 263.

19 United States v. Clark, 1 Paine, U. S. C Ct. 629, 640; Mussey v. Noyes, 26 Vt. 462; Bouchard v. Dias, 1 N Y. 201; Noyes v. Hicock, 27 Vt. 36; Tillon v. Britton, 4 Halst. (N. J) 120; Gay v. McIbree, 26 Pa. St. 92.

20 United States v. Howe, 3 Cranch, (U. S. C. Ct. 73, 91.

21 Mussey v. Noyes, 26 Vt. 462. *Contra*, see State Bank v. Chappelle, 40 Mich. 447.

22 Kohn v. Clement, 58 Iowa, 589; Carson v. Byers, 25 N. W. Rep. 826; Gage v. Parry, 29 N. W. Rep. 822.

23 Farwell v. Howard, 26 Iowa, 381; Doremus v. O'Harra, 1 Ohio St. 45; Mechanic's Bank v. Bank of Pa., 7 W. & S. 335; Low v. Wyman, 8 N. H. 536; Barker v. Hill, 13 N. H., 298.

pay his own debt and turns over his residue to an assignor, has been held a chattel mortgage.[24] But an assignment may be effected by means of an instrument, ostensibly, a mortgage.[25]

Assignment for Creditors Distinguished from Assignment in Payment of Debt.—An assignment in payment of a debt or debts differs from an assignment for the benefit of creditors in that the property is conveyed direct to the creditors. In an assignment for the benefit of creditors, the property is conveyed to a trustee to sell and distribute the proceeds among creditors. Hence, a transfer of all an insolvent's estate to a single creditor in payment of his debt is not a general assignment.[26]

So an assignment to a creditor, part of the considerations being the extinguishment of his debt, the rest of the purchase money to be paid to certain other creditors is not an assignment for the benefit of creditors.[27] In the last case, the court say that the conveyance might have been shown by parol evidence to have been intended to create a trust for creditors, if such were the facts, though it was ostensibly a purchase by the creditor in consideration of the extinguishment by him of his claim and the assumption by him of the debts due certain other creditors.

General Assignment for Creditors by More than One Instrument.—It seems generally conceded that a general assignment may be effected by more than one instrument. Thus, the conveyance to the assignee and the declaration of trusts may undoubtedly be by separate instruments.[28]

Preference in Contemplation of General Assignment.—How far may this principle be pushed so as to include as part of a general assignment a preference made in contemplation of a deed of general assignment, but by a separate instrument or transaction, where preferences in general assignments are illegal? The courts differ upon this point, and the difference of opinion seems to grow out of the differing views courts hold as to what constitutes a general assignment. Taking the technical view of a general assignment that it is a conveyance to a trustee to sell and distribute the proceeds among creditors, it would seem that a preference by mortgage or conveyance or confessions of judgment, could not constitute a part of an assignment for the benefit of creditors.[29] But if a general assignment is regarded merely as a general distribution of an insolvent's estate among his creditors, it would seem that the preference made in contemplation of the deed of general assignment might fairly be taken to be a part of that distribution of the insolvent's estate constituting a general assignment. The following cases have held mortgages made in contemplation of a general assignment part of the assignment and illegal preferences.[30] The opposite view has been held in Garrison v. Brown.[31] The following cases have held that confessions of judgment, made in contemplation of a general assignment, were part thereof.[32] In Mackie v. Cairns,[33] it was held that a confession of judgment in favor of a creditor, on the understanding that it was not to be resorted to unless a prior assignment was held invalid, was infected with all the vices of the assignment and must stand or fall with it.

Mortgages, confessions of judgment, etc., made shortly before, but not in contemplation of a general assignment, are universally admitted not to be a part of the assignment.[34] Whether mortgage, confessions of judgment, etc., was in contemplation of assignment or not is fact for the jury.[35] In Massachusetts, it was held that a prior mortgage, executed in contemplation of a general assignment, was a part of the assignment, when the mortgagee was the same person as the assignee.[36] But not when the mortgagee and assignee were different persons.[37]

LEWIS M. GREELEY.

Chicago, Ill.

24 Dunham v. Whitehead, 21 N. Y. 131; Dessar v. Field, 99 Ind. 548; Beach v. Bestor, 47 Ill. 521.

25 Livermore v. McNair, 34 N. J. Eq. 478; Burrows v. Lehndorff, 8 Iowa, 96.

26 Harkins v. Bailey, 48 Ala. 376; Atkinson v. Jordan, 5 Ohio, 178. *Contra*, see Martin v. Hausman, 14 Fed. Rep. 160; Duhlman v. Jacobs, 15 Fed. Rep. 863; Clapp v. Ditman, 21 Fed. Rep. 15.

27 Wilcoxon v. Annersley, 23 Ind. 285; Beach v. Bestor, 47 Ill. 521; Johnson v. McGrew, 11 Iowa, 151; Lockhart v. Stevenson, 61 Pa. St. 64; Danforth v. Denny, 25 N. H. 155; York County Bank v. Carter, 38 Pa. St. 446.

28 Norton v. Kearney, 10 Wis. 443; Van Vleet v. Slawson, 45 Barb. (N. Y.) 317; Van Horn v. Smith, 59 Iowa, 142.

29 See dissenting opinion of Rice, C. J., in Holt v. Bancroft, 30 Ala. 193, 205.

30 Van Putten v. Burr, 42 Iowa, 518; Berry v. Cutts 42 Me. 445; Kuse v. Moore, 8 Oreg. 158; Perry v. Holden, 22 Pick. (Mass.) 269; Freund v. Yaegerman, 26 Fed. Rep. 812.

31 26 N. J. L. 425; Wright v. Mark, 95 Ind. 332; Dodds v. Hills, 21 Kans. 707; Bailey v. Kansas Mfg. Co. 32 Kan. 73; Bates v. Coe, 10 Conn. 280.

32 Clapp v. Nordmeyer, 25 Fed. Rep. 71; Halm v. Salmon, 20 Fed. Rep. 801. *Contra*, Blakey's Appeal, 7 Pa. St. 449; Lord v. Fisher, 19 Ind. 7.

33 5 Cow. (N. Y.) 547.

34 Van Patten v. Marks, 55 Iowa, 224; Gage v. Parry, 29 N. W. Rep. 322; Perry v. Vezina, 63 Iowa, 25; Farwell v. Jones, 63 Iowa, 316; Bierbower v. Polk, 22 N. W. Rep. 699; Baldwin v. Freyendall, 10 Bradw. 106; Lyon v. McIlvaine, 24 Iowa, 9.

35 Mower v. Hunford, 6 Minn. 535, 545; Coots v. Chamberlain, 39 Mich. 565.

36 Perry v. Holden, 22 Pick. 269.

37 Fairbanks v. Haynes, 23 Pick. 323; Housatonic and Lee Banks v. Martin, 1 Met. (Mass.) 294.

EVIDENCE — STATEMENT OF EMPLOYEE — WHEN ADMISSIBLE AGAINST EMPLOYER — MEMORANDA, MADE BY WITNESS, WHEN NOT ADMISSIBLE — ERROR — REVERSAL — WHEN JUDGMENT WILL BE REVERSED AND FOR WHAT ERRORS.

VICKSBURG, ETC. CO. V. O'BRIEN.

Supreme Court of the United States, November 1, 1886.

1. The statement of an employee (engineer of a train) as to its rate of speed, made from ten to thirty minutes after the accident which formed the cause of action, is not admissible in evidence against his employer, the railroad company,

2. The memorandum, made by a physician as to the condition and injuries of his patient, made after attendance upon her, is not admissible, in connection with his personal testimony, it not appearing that he could not remember the facts stated in the memorandum. And this, although he orally testified to the material facts set forth in the memorandum.

3. A judgment will not be reversed for an error which did not affect injuriously the interest of the party excepting. A reversal will be ordered if it appears that error did operate, or might have operated, to his disadvantage.

HARLAN, J., delivered the opinion of the court:

This action was brought by Mary E. O'Brien and her husband, John J. O'Brien, to recover damages sustained in consequence of personal injuries received by the wife in September, 1881, while a passenger upon the Vicksburg & Meridian Railroad. The declaration alleges that the company "so carelessly, negligently, and unskillfully constructed and maintained its railroad track, engine, and cars, and so carelessly, negligently, and unskillfully conducted itself in the management, control, and running of the same," that the car in which Mrs. O'Brien was seated as a passenger was thrown from the railroad track and overturned, whereby she was seriously injured. There was a verdict and judgment for $9,000 in favor of the plaintiffs.

1. At the trial the plaintiffs offered to read to the jury the deposition of a physician, and did read the first, second, and third interrogatories propounded to him, and the answers thereto. Responding to the first and second interrogatories, he stated, among other things, that his attendance upon Mrs. O'Brien commenced on the sixteenth of September, 1881; that he found her suffering extreme pain, and in a very nervous condition, resulting a few hours before from a railroad accident on defendant's road; that such was the cause of her injuries he knew from her own answers, from the statement of her brother-in-law, and from attending others who were on the train with her. The third interrogatory and answer were as follows; "(3) Look on the accompanying statement, dated November 26, 1881, and state if it was written by you at the date it bears, for what purpose it was written, and to whom it was delivered? Does the statement represent, substantially and correctly, Mrs. O'Brien's condition as it appeared when you first saw her, and as it continued up to November 26, 1881? Answer. I have looked upon the statement referred to, which was written by myself, at Mr. O'Brien's request, at the date mentioned, when he was about to take his wife away from here to his home in New Orleans, and was intended to convey an idea of how she was when I was called to see her, and what her condition was when she left my charge; and, in my opinion, I correctly stated her condition at times referred to."

The written statement referred to in the interrogatory was signed by the witness, and attached to his deposition as an exhibit. It was addressed to Mr. O'Brien, and sets forth, with much detail, the nature of the injuries received by the wife, and their effect upon her bodily and mental condition. It also embodied an expression of the witness' opinion as to the probable length of time within which she might recover from her injuries. The plaintiff, before reading the remaining interrogatories and answers, offered to read this statement to the jury as evidence. The company objected upon these grounds: That it was not made by the witness under oath, and in defendant's presence, or with its knowledge and consent; that it was hearsay evidence, and, therefore, wholly incompetent; and that, in any event, it could only be referred to by the witness to refresh his recollection. The court overruled the objection, and permitted the statement to be read in evidence, the defendant taking an exception thereto, which was allowed. The remainder of the deposition was then read to the jury.

We are of opinion that this ruling cannot be sustained upon any principle recognized in the law of evidence. The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him, under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it. But there are adjudged cases which declare that, unless prepared in the discharge of some public duty, or of some duty arising out of the business relations of the witness with others, or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charging him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence. There are, however, other cases to the effect that, where the witness states, under oath, that the memorandum was made by him presently after the transaction to which it relates, for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper may be received as the best evidence of which the case admits.

The present case does not require us to enter upon an examination of the numerous authorities upon this general subject; for it does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection, there was no necessity whatever for reading that paper to the jury. Applying, then, to the case the most liberal rule announced in any of the authorities, the ruling by which the plaintiffs were allowed to read the physician's written statement to the jury as evidence, in itself, of the facts therein recited, was erroneous.

It is, however, claimed, in behalf of the plaintiffs that, in his answers to other interrogatories, the physician testified, apart from the certificate, to the material facts embodied in it, and that, therefore, the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason, should not be a ground of reversal. We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury. In estimating the damages to be awarded, in view of the extent and character of the injuries received, the jury, for aught that the court can know, may have been largely controlled by its statements. The practice of admitting the un-

sworn statements of witnesses, prepared in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence. While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed, unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party. Smiths v. Shoemaker, 17 Wall. 630, 639; Deery v. Cray, 5 Wall. 795; Moores v. National Bank, 104 U.S . 630; Gilmer v. Higley, 110 U. S. 50; s. c. 3 Sup. Ct. Rep. 471.

2. At the trial below plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident about the rate of speed at which the train was moving at the time. To that question the defendant objected, but its objection was overruled, and the witness permitted to answer. The witness had previously stated that, on examination of the track after the accident, he found a cross-tie or cross-ties under the broken rail in a decayed conditon. His answer to the above question was: "Between ten and thirty minutes after the accident occurred I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me that the train was moving at the rate of eighteen miles an hour." The defendant renewed its objection to this testimony by a motion to exclude it from the jury. This motion was denied, and an exception taken. As bearing upon the point here raised it may be stated that, under the the evidence, it became material—apart from the issue as to the condition of the track—to inquire whether, at the time of the accident, (which occurred at a place on the line where the rails in the track were, according to some of the proof, materially defective,) the train was being run at a speed exceeding 15 miles an hour. In this view, the declaration of the engineer may have had a decisive influence upon the result of the trial.

There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence; "being," says Phillips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admission, of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all; and, therefore, it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." 1 Greenl. Ev. § 113. This court had occasion, in Packet Co. v. Clough, 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice Story in his Treatise on Agency, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*," the court, speaking by Mr. Justice Story, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*."

We are of opinion that the declaration of the engineer, Herbert, to the witness Roach, was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident, had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*,—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making

of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between 10 and 30 minutes—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it will follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the States.

We deem it unnecessary to notice other exceptions taken to the action of the court below.

This case was decided at the last term of this court, and Mr. Justice Woods concurred in the order of reversal upon the grounds herein stated.

For the errors indicated the judgment is reversed, and the cause is remanded for a new trial, and for further proceedings consistent with this opinion.

FIELD, J., (dissenting): I am not able to give my assent to the judgment of the court in this case. The statement by the physician as to the condition of the injured party, the admission of which is held to have been error, was proved by his deposition to have been correct. Every material fact, also, which it contained, was established by his independent testimony. It would not be in accordance with the usual action of men, in the ordinary concerns of life, to reject, as incompetent evidence, a written statement thus made by a physician as to the condition of a patient under his charge, when it is subsequently proved by him to be true in all its details. And it should seem that evidence upon which every one would act without hesitation in the common affairs of life ought not to be excluded from consideration, except for clear reasons of policy, or long-established rules to the contrary, when those affairs are brought into litigation before the courts. If the recollection of the condition of the patient had passed from the mind of the physician, and he could still have testified that the statement made by him when the patient was under his charge was true, it would have been admissible. It is difficult, therefore, to find any just reason for excluding it from the fact that, in corroboration of its truth, the physician also testified to the facts therein stated.

The admission of the declaration of the engineer, as to the rate of speed of the train at the time of the accident, was, in my judgment, admissible as part of the *res gestæ*. The rails and cross-ties of the road were in a bad condition. Some of the rails had been used for over 40 years, and some of the cross-ties were decayed, and it appears that the accident was caused by a decayed cross-tie and a broken rail. As the declaration was made between 10 and 30 minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and, while surrounded by excited passengers. The engineer was the only person from whom the company could have learned of the exact speed of the train at the time; to him it would have been obliged to apply for information on that point. It would seem, therefore, that his declaration, as that of its agent or servant, should have been received. The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it.

The case of Hanover R. Co. v. Coyle, 55 Pa. St. 402, is in point. There it appeared that a peddler's wagon was struck by a locomotive, and the peddler was injured; and the question was as to the admissibility of the declaration of the engineer that the train was behind time, to show carelessness and negligence. The Supreme Court of Pennsylvania held it admissible. "We cannot say," said the court, "that the declaration of the engineer was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

What time may elapse between the happening of the event in respect to which the declaration is made and the time of the declaration, and yet the declaration be admissible, must depend upon the character of the transaction itself. An accident happening to a railway train by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of explanation for a considerable time afterwards by persons connected with the train. The admissibility of a declaration, in connection with evidence of the principal fact, as stated by Greenleaf, must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, he adds, whether the

declaration was contemporaneous with the main fact, and so connected with it as to illustrate its character.

But, independently of this consideration, there is another answer to the objection taken to the admissibility of the declaration of the engineer. It was immaterial in any view of the case. The engagement of a railroad company is to carry its passengers safely; and, for any injury arising from a defect in its road, or in the rails or ties, which could have been guarded against by the exercise of proper care, it is liable. Its liability does not depend upon the speed of the train, whether it was one mile or eighteen miles an hour. Though as a carrier of passengers it is not, like a carrier of property, an insurer against all accidents except those caused by the act of God, or the public enemy, it is charged with the utmost care and skill in the performance of its duty; and this implies not merely the utmost attention in respect to the movement of the cars, but also to the condition of the road, and of its ties, rails, and all other appliances essential to the safety of the train and passengers. For all injuries through negligence, to which the passenger does not contribute by his own acts, it is liable. So it matters not what the speed of the train was in the case at bar, nor what was the declaration of the engineer in that respect.

I am authorized to state that the chief justice, Mr. Justice Miller, and Mr. Justice Blatchford concur in this dissent.

WEEKLY DIGEST OF RECENT CASES.

1. CONSTITUTIONAL LAW—*Municipal Corporation—Free Speech—Public Processions—Habeas Corpus.*—Any by-law of a municipal corporation which violates any of the recognized principles of legal and equal rights is necessarily void, so far as it does so, and void entirely if it cannot be reasonably applied according to its terms. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of the power of a city in taking precautionary measures to repress acts tending to produce danger and disorder; and no inference can extend beyond the fair scope of its powers granted for such purpose in its charter. It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten tangible public or private mischief, that the law interferes, because of the evil done or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful. A by-law of a municipal corporation which suppresses what is in general perfectly lawful, and leaves the power of permitting or restraining processions, and their courses through the streets, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially, is not reasonable. No penalty can be sustained that exceeds in amount what is reasonable, and the by-law of a municipal corporation cannot properly impose any sum, sliding or fixed, which exceeds that. Under a city charter which declares that where authority exists to pass ordinances, the common council may prescribe a fine, penalty, or forfeiture not exceeding $500 for its violation, the city council cannot, without exercising any discretion themselves, turn over this extravagant power to the local courts. *Re Frazee*, S. C. Mich., Oct. 28, 1886; 6 Western Rep., 140.

2. CONTRACT—*Consideration—Attorney's Costs—Public Benefit—Statute of Frauds—Collateral Promise to Pay—Rev. St. Wis. § 2302.*—In an action on an agreement by defendant, president of a village board, to pay the costs and charges of plaintiffs, as attorneys, in prosecuting suits for sale of intoxicating liquors, under the direction of the board, in case of their being unable to collect the same from such village, the benefit or advantage to arise to defendant, as a citizen and officer of such village, from the enforcement of the laws against the sale of intoxicating liquors, is not a good and valuable consideration, sufficient to support the promise to pay as a new agreement, separate and independent from plaintiff's agreement with the village. An oral agreement, made with attorneys employed to prosecute suits by a village, to pay the costs and expenses of such attorneys in case of their inability to collect them from the village, which at the time is under preliminary injunction enjoining it from paying for such prosecutions, is void, as being a collateral promise within the statute of frauds. Rev. St. Wis., § 2302. *Hooker v. Russell*, S. C. Wis. Nov. 23, 1886; 30 N. W. Rep. 356.

3. CORPORATION—*Municipal Corporation—Liability of, for Defective Sewer—Negligence—Judgment—Verdict—Presumption.*—A municipal corporation is responsible for negligence in devising the plan of a sewer, as well as for negligence in executing the plan, but it is not responsible for mere errors of judgment. If the inadequacy in the size of the sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work, the corporation is liable, but if the inadequacy is attributable to a mere error of judg-

ment, there is no liability. Where there is a general verdict against the appellant, neither presumption nor intendment in his favor can be made for the purpose of awarding him a judgment. A special finding, that there was no negligence of the city, and that the city has undertaken to build a sewer where there was a natural watercourse, and the culvert is of less capacity than the watercourse was, but how much less is not found, will not control the general verdict. Such a finding is not inconsistent with the general verdict, nor does it find all the facts essential to a recovery. Where a plaintiff asks a judgment on the special findings, notwithstanding the general verdict, he will fail unless all the findings are favorable to him. To constitute a natural watercourse there must be a bed and banks and evidences of a permanent stream of running water. Ravines through which surface water occasionally flows are not natural watercourses, within the meaning of the law. A city is liable if it undertakes to collect the water in one channel, and is negligent in devising the plan or performing the work, or providing an outlet where one is made necessary by its own act. A city is not liable if it undertakes to collect water in one channel and convey it past the property of the plaintiff, and fails because the officers of the city may have erred in judgment as to the size of the sewer or culvert, where the special finding of the jury is that such error was not the result of negligence. *Rice v. City of Evansville*, S. C. Ind. Oct. 16, 1886; 6 Western Rep. 249.

4. CRIMINAL LAW—*Plea in Abatement—To Drawing of Grand Jury—Requisites—To Competency of Grand Jury — Must Show in What Respect the Juror is Disqualiged—Pub. St. R. I., Ch. 200*, § 1.—It is the duty, not of the city council of Newport, Rhode Island, but of the board of aldermen of said city, to draw the grand jurors required of it; and a plea in abatement to an indictment "that one of the grand jurors was not drawn by the town council, nor by the city council of Newport," is bad upon demurrer, because it does not negative the possibility that he was legally drawn. A plea in abatement to an indictment that one of the grand jurors was not "qualified to vote upon any proposition to impose a tax, or for the expenditure of money" (the words of Pub. St. R. I. ch. 200, § 1), is a bad plea, as too general; amounting, in another form of words, simply to that he was not qualfied to serve as a grand juror, and as not alleging in what respect he was not qualified. *State v. Duggan*, S. C. R. I. Oct. 26, 1886; 6, Atl. Rep. 597.

5. —— *Appeal—Credibility of Witnesses.*—In an indictment for rape, where the testimony of the prosecuting witness and that of the prisoner is in direct conflict, but the former is corroborated in important particulars, it is for the jury to decide upon the credibility of the witnesses, and the court will not interfere with their decision on appeal. *State v. Hert*, S. C. Mo., Nov. 15, 1886; 1 S. W. Rep. 830.

6. —— *Malum Prohibitum—"Willfully and Maliciously" — Intent — Particular Case.* — When a statute makes indictable an act which is merely *malum prohibitum* when done "willfully and maliciously," the existence of an evil mind in doing the forbidden act is, as a general rule, a constituent part of the offense. A person was indicted under the act prohibiting the willfully and maliciously tearing down of a sheriff's advertisement. *Held*, that the defendant had the right to show that he tore down such paper without any evil design. *Falwell v. State*, S. C. N. J. Nov., 17, 1886; 6 Atl. Rep. 619.

7. —— *Murder — Manslaughter.* — To constitute manslaughter there must have been no design to kill. If such design be present, the offense is murder in one of its degrees. For existence of the deliberation required to constitute the statutory crime of murder in the first degree the time need not be long and may be short. If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and the mind was busy with its design and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled. *People v. Beckwith*, N. Y. Ct. App. Oct. 26, 1886; 4 Cent. Rep. 539.

8. CUSTOM AND USAGE—*Railroad Ticket Agent—Evidence — Carriers—Of Passengers — Tickets—Particular Train.*—Where plaintiff seeks to prove such a fixed custom by the ticket agent of a railroad company as will prevail over the published notices and time-tables of such company, of which the plaintiff is presumed to have knowledge, the evidence must show that the custom is so prevalent that every one is supposed to know of its existence, and to act with reference to it; and evidence by plaintiff and his witnesses, to the effect that they have individually assumed the custom to exist, and acted upon it, though they have not tested it or heard of it from others, is legally insufficient to establish it. Where, just as a train is coming up, an intending passenger buys a ticket of the agent to a station on the line in the direction in which the train is going, marked, "For this day and train only," the selling, at such a time, of a ticket so marked, does not of itself, in the absence of express representations to that effect by an agent of the company, imply a contract by it to carry such passenger to that station, by that particular train, when the posters and time-tables of the company showed that the train did not stop there, and, by the custom of the company, the ticket is good for any train on that day, or till used. *Duling v. Philadelphia, etc, Co.*, Md. Ct. App. Nov. 12, 1886; 6 Atl. Rep. 592.

9. EQUITY—*Bill to Set Aside Decree—Wrong Name — Idem Sonans — Judgment — Order — Name of Defendant — Immaterial Omission — Writ and Process — Publication — Decree — Presumption — Supplemental Bill — Creditor's Bill — Parties.*— Where a bill is filed to set aside a decree in equity on the ground that complainants were sued by the wrong name, and therefore were not before the court, if the names of the persons are *idem sonans*, the bill will be dismissed. Where, in an entry on a rule docket and minutes of the court, the name of a defendant is not written, the omission is immaterial, as an order or a judgment in a cause, referring to defendants in general terms, refers to all defendants, whether named or not. Where a bill is filed to set aside a decree, as void, on the ground that there was no sufficient publication against the defendant, if publication is recited therein as having been made, it will be presumed to have been made, according to law. Where a bill in equity has been filed by creditors to subject the land of a decedent to the payment

of his debts, and it is discovered, before the termination of the suit, that some other person has an interest in the land, who had not been made a party to the suit, he may be brought before the court by a supplemental bill. *Robertson v. Winchester*, S. C. Tenn., September Term 1886; 1 S. W. Rep. 781.

10. —— *Specific Performance — Pleading — Real Agreement Enforced—Vendor and Vendee—Construction of Contract—Title.*—In a suit for the specific performance of a contract for the sale of land, the defendant has a right to plead a contract in his answer different from the one alleged in the complaint, and, on such a state of the pleadings, the trial court will ascertain from the evidence which was the real agreement, and enforce it accordingly. Where, in a contract for the sale of land, terms are such as to bind the grantor to convey by good and sufficient deed, or to make a good and sufficient conveyance, he can only perform his agreement by making a deed that will pass a good title. But if it clearly appears from the contract itself, or from the circumstances accompanying it, that the parties had in view merely such conveyance as will pass the title which the vendor had, whether defective or not, that is all the vendee can claim or insist upon. *Thompson v. Hawley*, S. C. Oreg., Nov. 29, 1886; 12 Pac. Rep. 276.

11. —— —— *When Refused — Mutuality of Contract — Homestead — Conveyance of — Contract Void in Part.*—Where one party to a contract could not have enforced it as it stood, equity will not hold him bound to perform at the instance of the other party. Property occupied as a homestead cannot be disposed of except by the joint action of husband and wife. Where the property named in a contract of sale includes a homestead and additional property, at a gross sum, and so much of the contract as relates to the homestead is void for failure of the wife to join as a party, the contract cannot be enforced as to the residue. *Hall v. Loomis*, S. C. Mich., Nov. 17, 1886; 30 N. W. Rep. 374.

12. EVIDENCE — *Handwriting — Comparison of Hands—Appeal—Necessity of Bill of Exceptions.*—In an action upon a promissory note, where the defense is a denial that the defendant indorsed the note, and a witness who has frequently seen the defendant write, and is familiar with his signature, testifies that, in his opinion, the indorsement is not the defendant's signature, and states that his opinion is based upon the fact that the defendant's handwriting is heavier and larger than the indorsement in question, it is competent, on cross-examination, notwithstanding the Maryland rule against the proof of handwriting by comparison of hands, to exhibit to the witness, for the purpose of refreshing his memory, a letter on a subject foreign to the case, which had been shown to the defendant, and by him admitted to be in his handwriting, both body and signature, and then ask the witness whether he still retained his opinion. The rulings of the trial court can only be legitimately certified to the appellate court through the medium of bills of exceptions, regularly signed and sealed by the judge, and a certificate or statement of the facts, appended to the record, and signed by the trial judge, cannot be considered. *National Bank Chester v. Armstrong*, Ct. App. Md. Nov. 12, 1886; 6 Atl. Rep. 584.

13. —— *Parol Testimony—Written Admissions—Trial—Instructions—Evidence—Reputation as to Chastity—Charge.*—A mere admission of a fact, subsequently in issue, although made in writing by the party, may be contradicted or explained by his oral testimony. An instruction to a jury that evidence by competent witnesses that one's character for chastity had never been questioned, is the "very best" evidence that could be given concerning his reputation for chastity, *held* not erroneous. A caution to the jury in the course of the charge, not to lose their heads, and return a verdict for a lady (the plaintiff) on general principles, *held* not erroneous. *Bingham v. Bernard*, S. C. Minn., Nov. 29, 1886; 30 N. W. Rep. 404.

14. EXECUTION—*Sale—Deed—Description—Uncertain Description—Rights of Purchasers—Bona Fide Purchasers—Transfer Not Within Registration Laws—Possession—Co-Tenant.*—A description in the judgment, in the order of sale, and in the sheriff's deed, in the following terms: "25 acres of land, lying situate west of the railroad, and close to and adjoining said Wayne Station,"—is uncertain, and therefore insufficient to pass title, there being a large number of tracts to which the same description might apply. A valid parol partition of real estate, though it may not be within the operation of the registration laws does not bind a purchaser at execution sale, for value, without notice. Mere possession by one who appears of record to be a tenant in common is no notice to an innocent purchaser for value of a parol partition made by the tenants in common. *Allday v. Whitaker*, S. C. Tex., Nov. 5, 1886; 1 S. W. Rep. 794.

15. EXECUTOR—*Co-Executor—When Former Liable for Acts or Default of Latter.*—Where an executor has knowledge, or by the use of reasonable diligence could have knowledge, that funds of the estate in possession of his co-executor are not being properly invested, but are being used in the business of a firm of which the co-executor is a member, with allowance of interest thereon, and he fails to endeavor to have such funds properly invested or to remonstrate with his co-executor, he is liable for loss arising from such use of the funds. If the circumstances are such as to create a doubt in respect to the safety of uninvested funds of the estate, an executor is not exonerated from the duty of vigilance in protecting them and seeing that they are properly invested, by the fact that such funds were never in his possession or under his actual control, but were received by and were in the exclusive possession of his co-executor. An executor is not a guarantor for the safety of securities committed to his charge and does not warrant such safety under all circumstances, and hence is not liable for a breach of trust on the part of his co-executor in wrongfully taking and converting securities belonging to the estate, lawfully in the sole possession and charge of such co-executor, unless it appears that he had knowledge of, or assented to the acts of his co-executor, or had notice which should have put him on inquiry. *Willmerding v. McKesson*, N. Y. Ct. App., Oct. 12, 1886; 4 Cent. Rep. 525.

16. FRAUDULENT CONVEYANCES—*Deed by Son to Father—Consideration—Past Services—Evidence*

—*Condition of Note — Witness — Credibility of Witness—Fraud on Creditors—Evidence.*—Where a father, a man unaccustomed to business, worked for thirteen years for his son, had been frugal, honest, and saving in habits, and had allowed his son to retain his earnings upon paying interest thereon, and other circumstances showed the good faith of this relation, a conveyance by the son to the father for the debt thus incurred is not void as against creditors; affirming State Bank of Fenton v. White, 48 Mich.; 1., s. c., 11 N. W. Rep. 756. Evidence that a note given by a son to his father for an alleged indebtedness did not appear ancient, dirty, folded, or creased to a witness who saw it three years after the date alleged on its face, is not sufficient to establish its fraudulent character, especially when weighed against evidence showing unbusiness-like habits in the father, and the *bona fides* of the indebtedness. A witness seventy-eight years of age, and of so feeble memory as to have but little knowledge of passing events or of past transactions, is worthless to prove that a certain conveyance to him was fraudulent as against creditors, by denying all knowledge of the existence of the debt which formed its consideration. Suspicion as to the *bona fides* of a conveyance by a son to his father, arising out of the failure to produce in its defense, the available testitimony of the father, cannot avail to establish the fraudulent character of such conveyance in another subsequent suit, when the testimony of the father has become worthless through age and loss of memory; especially when evidence *aliunde* is strong as to the *bona fides*. *Woodhull v. Whittle*, S. C. Mi ch., Nov. 11, 1886; 30 N. W. Rep. 368.

17. Husband and Wife—*Married Women—Action Against—Separate Estate—Contract—Consideration—Moral Obligation—Consideration Enforceable in Equity—Rule at Common Law—No Separate Estate—Obligation Not Enforceable in Equity.*—It s essential to recovery against a married woman, in an action at law, by force of the statute of 1862, that she be shown to have a separate estate chargeable in equity with the debt contracted by her. A mere moral obligation or duty is not sufficient consideration to support a subsequent express promise to pay. An obligation enforceable in equity will support an express promise to pay, and make it suable at law. At common law the promise of a *feme covert* could not be enforced against her, unless she had a separate estate. No personal decree could be made against her, but her contract operated as an appointment out of her separate estate. Where the *feme covert* has no separate estate, her contract does not create an obligation which is enforceable in equity, and therefore is not such a consideration as will support her express promise to pay, made after the death of her husband. *Condon v. Barr*, S. C. N. J., Nov. 13, 1886; 6 Atl. Rep. 614.

18. —— *Right of Husband's Creditors to Wife's Property—Gratuitious Services of Husband to Wife.*—Where a wife engages in business, the husband has a right, as against his creditors, to work for her without compensation, and they cannot charge her property with his debts on the ground that the relation between her and her husband is a fraud on them. *King v. Voos*, S. C. Oreg., Nov. 9, 1886; 12 Pac. Rep. 281.

19. Habeas Corpus—*Return to Writ—Contempt—Witness—Refusal to Answer Impertinent Questions.*—A return to a writ of *habeas corpus*, sued out by a witness who has been committed for contempt in refusing to answer a question, should show that the question which he refused to answer was pertinent to the matter in issue before the court, and on the return failing to show this, the prisoner will be discharged. Where a judge puts to a witness a question which is not pertinent to any issue before the court at the time the question is put, the refusal of the witness to answer it is no contempt, and the court has no jurisdiction to imprison him for such refusal. *Ex parte Zechandelauer*, S. C. Cal., Oct. 29, 1886; 12 Pac. Rep. 261.

20. Insurance—*Life Insurance Policy—Construction of—Conditions—Intoxicating Liquors—Practice—Directing a Verdict.*—Where, by the terms of a policy of life insurance, the assured warrants the truth of the answers to questions in the application, compliance with such warranty is a condition of the validity of the contract; and any substantial deviation from the truth in such answers is material to the risk and constitutes a breach of the contract, rendering the policy void. Parties to an insurance contract have the right to insert therein such lawful conditions as they may agree upon or which they may consider necessary and proper to protect their interests, which, when made, must be construed and enforced according to the expressed intent of the parties. If an insurance policy, in plain and unambiguous language, makes the observance of an apparently immaterial requirement the condition of a valid contract, it can not be disregarded, nor can a new contract be constructed, by implication or otherwise, in the place of that made by the parties; and such contract is open to construction only when it appears upon the face of the instrument that its meaning is doubtful or its language is ambiguous or uncertain. Hence, when the insured, in his application answered "no," to the question whether he was then or had been engaged in or connected with the manufacture or sale of wine, beer, or intoxicating liquors, and the evidence showed that he had kept a hotel, wherein no bar was maintained, but where he had a supply of wines and liquors; that he had licenses and permits to carry on the business of selling beer, wines and liquors at retail to be drunk on the premises; and that he systematically sold wines and liquors in bottles to such of his guests as desired, but not to other persons—the facts constituted a breach of warranty as matter of law; and it was error for the trial court to refuse a nonsuit and to leave it to the jury to say whether the sales of liquor proved were sales at all, within the intent and meaning of the contract. If the proof of a fact is so preponderating that a verdict against it would be set aside as contrary to the evidence, it is the duty of the court to direct a verdict. It is not the rule that if there is a scintilla of evidence in support of a proposition, or if the evidence against it does not amount to a demonstration of its incorrectness, a question is raised which must be left to the jury.—*Dwight v. Germania, etc. Co.*, N. Y. Ct. App., Oct. 12, 1886; 4 Cent. Rep. 529.

21. Landlord and Tenant—*Lease—Covenant to "Keep in Clean and Orderly Condition"—Breach Gen. Stat. Minn. 1878, Ch. 84—Evidence—Breach of Condition in Lease.*—In a lease it was

specified that the lessees should keep the premises "clean," and that they should not be occupied for a saloon or meat market. *Held*, that the agreement to keep the premises clean was not qualified by an implied right on the part of the lessees to use the premises for any purpose, however foul in itself, excepting only those occupations mentioned. A finding by the court that the condition of the lease had not been broken, *held*, contrary to the evidence.—*Clementson v. Gleason*, S. C. Minn., Nov. 22, 1886; 30 N. W. Rep. 400.

22. —— *Railroad Land—Notice of Forfeiture—Lease—Emblements*,—One S took an assignment of a contract or purchase of certain railroad lands, and rented said lands to a tenant for a share of the crops. The contract of purchase contained a provision that, in case of the failure of the purchaser or his assignee to make payments thereon, "and each of them, punctually and upon the strict terms and times above limited, and likewise perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, so far as it may bind said first party, shall become utterly null and void:" *Held* (1), that the rights of the vendee did not terminate until there was an actual forfeiture; (2) that where the vendee had been in default for a number of years, and had by his tenant sowed a crop before a forfeiture of his estate in the land, such forfeiture before the crops were ripe did not deprive him of his interest in such crops.—*Sornborger v. Berggren*, S. C. Neb., Nov. 24, 1886; 30 N. W. Rep. 414.

23. LANDS—*Public Lands—Grants to Kansas for Railroad Purposes — Union Pacific Railroad — Neosho Valley Branch—Title to Lands.*—The acts of congress of March 3, 1863, July 1, 1864, and July 26, 1866, granting lands to the State of Kansas for railroad purposes, are to be construed *in pari materia*, and as having the one purpose of building a road from Fort Riley, down the Neosho valley, to the southern line of that State, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted. The junction of this road with the one from Leavenworth, by way of Lawrence, in the direction of Galveston bay, as provided in the act of 1863, was not required to be on the very crest of the Neosho valley, as reached by the latter road, but at a convenient point for such crossing in the narrow valley of the Neosho river; and as this point has been adopted by the companies building both roads, and accepted by the officers of the land department in selecting indemnity lands, there is no sufficient reason to be found in the point of junction to vacate the certification of these lands to the State for the company which has built the road and received the patents of the State. Nor is there any other sufficient reason found in the record in this case for setting aside the evidence of title to these lands issued to the corporation which built the roads within the time required by law, to the approval of the officers of the government, whose primary duty it was to certify these lands, and who did so within the scope of their powers.—*Kansas City, etc. Co. v. Brewster, Atty. Gen.*, S. C. U. S., Nov. 8, 1886; 7 S. C. Rep. 66.

24. LIBEL—*Pleading—Innuendo Publication—Construction—Justification—Notice—Order of Proof—Rulings on Immaterial Issues—General Statements of Misconduct.*—In an action for libel, the office of an innuendo is to aver the meaning of the language published; if the meaning of the publication is plain, none is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense. It is not needed where the common understanding takes the published words and at once applies a libelous meaning to them. The office of pleading is to make clear and certain the matters set forth and complained of; and when a publication claimed to be libelous has a clear and certain meaning upon its face, there can be no better pleading than to set out the article in terms and in full, when all of it is pertinent to the issue; and the addition of an innuendo, when none is necessary, can add nothing to a clear perception of its meaning, but tends rather to cumber and obscure it. A publication which charges plaintiff with gross misconduct in office, with arresting and hand-cuffing men without right, and oppressing the poor and friendless under color of office, is plainly libelous, as holding plaintiff up to the scorn and aversion of the public. If there is any doubt as to the meaning of the publication, so that extrinsic evidence is needed to determine its actionable or non-actionable character, it is then a question for the jury, under proper instruction from the court, to find its signification. If the article, standing alone, is plainly libelous, or manifestly wanting in any defamatory meaning, it is the duty of the court to so declare and instruct the jury accordingly. Where the notice of justification contained no specific averments, and was confined to the statements in the libel concerning the plaintiff, it was not competent, either in justification or mitigation, to prove another act, not mentioned in the libel, and not justified; and testimony offered for this purpose was properly ruled out. While the order of proof is sometimes discretionary, it is not a safe practice to call upon a court to pass upon a proposed statement of fact which is irrelevant, unless shown to apply to the plaintiff, without at least laying the foundation by showing that the witness can answer as to its application. The practice of allowing parties to get rulings on matters of which the witness may know nothing, or may know nothing relevant—as where, without laying a foundation, plaintiff's counsel twice proposed to let witness answer whether plaintiff arrested him—is a practice which deserves no favor. The practice is settled that it is not competent to prove distinct facts in defense, which have not been made part of the issues as framed. General statements of misconduct are not actionable.—*Bonresseau v. Detroit Evening Journal Co.*, S. C. Mich., Nov. 4, 1886; 6 West. Rep. 151.

25. MALICIOUS PROSECUTION—*Evidence—Character of Defendant—Damages—Attorney's Fees.*—In an action for malicious prosecution, evidence of the bad character of the defendant for peace and quietude is not admissible in chief, although it appears that the original prosecution grew out of a personal collision between the parties. In an action for malicious prosecution, the plaintiff may prove, as an element of damages, the amount of expense incurred for attorney's fees in defending the criminal charge, without showing that the

same has actually been paid.—*Walker v. Pittman*, S. C. Ind., Nov. 23, 1886; 9 N. E. Rep. 175.

26. MALPRACTICE—*Burden of Proof—Evidence of Professional Reputation.*—In a suit against a physician for malpractice in treating a fractured leg, the burden of proof to show want of proper skill is on the plaintiff; and in such a case, while the skill of the defendant, or the want of it, is put in issue, his reputation in that respect is not put in issue, and evidence to establish it is properly excluded.—*Holtzman v. Hoy*, S. C. Ill., Nov. 13, 1886; 8 N. E. Rep. 832.

27. MORTGAGE—*Rights of Mortgagee—Mortgagee in Possession—Application of Rents and Profits—Contract Affecting — Judgment — Reversal—Failure to Find on Issue Raised.*—A mortgagee in possession may, under contract with the mortgagor to that effect, apply the rents and profits of the mortgaged premises, in excess of the interest due on the mortgage debt, to the payment of unsecured indebtedness due or to become due from the mortgagor to the mortgagee. A judgment rendered upon a finding of the truth of the allegations of a cross-complaint, without any findings on the issues raised by the answer to the original complaint in the action will not be sustained, when the allegations of the cross-complaint do not cover the issue thus raised. *Demick v. Cuddihy*, S. C. Cal., Dec. 7, 1886; 12 Pac. Rep. 287.

28. —— *Foreclosure — Death of Defendant — No Revival—Decree and Sale Void—Guardian and Ward—Plaintiff's Attorney Guardian ad Litem of Infant Defendant.*—Where a defendant in an action for the foreclosure of a real-estate mortgage dies during the pendency of the cause, and a decree is obtained, and sale had under it, without suggesting the death of such defendant, nor reviving the suit against his heirs, such sale is a nullity; nor could a revival occur until such suggestion is made. The appointment of the attorney of plaintiff as guardian *ad litem* for an infant defendant is wholly unauthorized; nor does it help the matter that the plaintiff and one of the adult defendants consented of record to such appointment. *Sargeant v. Rowsey*, S. C. Mo., Nov. 15, 1886; 1 S. W. Rep. 823.

29. PARTNERSHIP—*Liability of One Holding Himself Out as Partner—Instruction—Verdict Rendering Refusal Immaterial—Necessity of Requesting Instruction — Evidence Admissible for One Purpose, and not for Another.*—An instruction of the court, in an action seeking to hold two defendants liable as partners, that if the jury believe from the evidence that defendants represented themselves to be partners, and thereby induced plaintiffs to sell them goods, they would be liable as partners, whether so in fact or not, is correct, and not objectionable as being an instruction upon the weight of evidence. If two defendants are found liable by the verdict, it is unimportant that the court refused to give instructions asked in relation to the result which would follow if only one of them should be found liable. If evidence is admitted which is admissible for one purpose, but not for another, a party desiring that it should be excluded from the consideration of the jury, so far as the latter purpose is concerned, should ask an instruction to that effect. *Walker v. Brown*, S. C. Tex., Oct. 26, 1886; 1 S. W. Rep. 797.

30. —— *Pleading—Rejoinder—No Material Averments—Issues Formed — Settlement — Mistake—Evidence.*—Before the rejoinder was filed issues had been formed upon all the matters in controversy, and there was no averment contained in the rejoinder which required to be traversed, or that could be taken as confessed by reason of failure to deny it. *Held*, that it was not error to disregard the averments contained in the rejoinder. After a settlement had been made between three partners in the cattle business, A, B, and C, by which a certain amount was found due from A and B to C, A and B sought to avoid the same on the ground of a mistake made in the settlement in failing to credit them with the full amount paid out by them in the purchase of cattle. They showed checks representing the sums claimed to have been thus omitted, which aggregated between $14,000 and $16,000, but no book-entries. A and B were engaged, at the same time, under the same firm name, but independently of C, in buying sheep and hogs. The number of cattle bought by A and B on the one hand, and by C on the other, was known, and a computation, based upon the amounts now claimed to have been paid out by A and B, as compared with the amounts claimed to have been paid out by C in the purchase of cattle, showed the average price per head paid by A and B to greatly exceed that paid by C. *Held*, upon this evidence, that a finding of the lower court supporting the settlement in the respects mentioned should be sustained. *Dixon v. Ford*, Ky. Ct. App., Nov. 20, 1886; 1. S. W. Rep. 817.

31. PAYMENT—*Promissory Note—Fraud Against Creditors.*—A creditor who has accepted in payment of a debt, a note which is void because given under an agreement which is in fraud of creditors, may maintain an action upon the original debt, and the defendant cannot set up as a defense the illegality of the agreement made between himself and the plaintiffs. *Walker v. Mayo*, S. J. C. Mass., Nov. 23, 1886; 8 N. E. Rep. 875.

32. PRACTICE — *Affidavit of Defense — Stranger.*—Where an affidavit of defense is made by a stranger, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability on the part of the defendant existed, which prevented him from making the affidavit himself, and the circumstances giving rise to it. An affidavit of defense filed by one styling himself "attorney for the defendant," and alleging that he transacted all the business in the case and has full knowledge, etc., will not be received. *Griel v. Buckius*, S. C. Penn., Oct. 4, 1886; 4 Cent. Rep. 507.

33. PROMISSORY NOTES — *Liability of Outside Party — Signing on Back.* — A promissory note, payable to M or order, was delivered to the payee, who indorsed it in blank, and offered it to R in part payment for property purchased. R declined to take it without the signature thereon of C, a stranger to the note. C thereupon, before the maturity of the note, and to give it credit, signed his name under the indorsement of the payee, and the note was then taken by R. *Held*, that C was an unconditional guarantor, and that the owner and holder of the note had a *prima facie* right of recovery against him, without proof of demand and notice. *Castle v. Rickly*, S. C. Ohio, Dec. 7, 1886; 9 N. E. Rep. 136.

34. TROVER AND CONVERSION — *Conversion of Stock by Broker — Damages.* — Where a broker disposes, without authority, of stock which he holds for a principal, the measure of damages is the cost to the principal of replacing the stock within a reasonable time after such sale, and not the amount of money advanced by him for the purchase of the stock. *Brewster v. Van Liew*, S. C. Ill., Nov. 13, 1886; 8 N. E. Rep. 842.

35. TRESPASS — *To Real Property — Measure of Damages.* — Where defendant, without malice or oppression, has entered upon plaintiff's lot without consent, and opened trenches and laid water-pipes through said lot, the rule for ascertaining the true measure of damages, in an action of trespass therefor, is that plaintiff may recover as damages the sum required to put the premises in as good condition as they were in before the injury, with compensation for the use and enjoyment thereof, if he should be deprived thereof by the injury, and the value of such property, *e. g.*, trees as cannot be restored to its former condition. *Graessle v. Carpenter*, S. C. Iowa, Dec. 3, 1886; 30 N. W. Rep. 392.

36. —— *To Try Title—Intervenors — Joint Judgment—Error — Who Shall Join in — Aliens—Inheriting Lands—Defeasible and Indefeasible Titles —Foreign Law—Texas Acts of March 18, 1848, and February 13, 1854—Deed—Proof of Execution—Subscribing Witnesses—Erasure in Name—Husband and Wife—Community Property—Presumption — Rebutting — Principal and Agent — Power of Attorney — Revocation — Death — Construction of — To Recover Interest of Heirs — Estoppel — Deed—Warranty—After-Acquired Title.* —If, in trespass to try title to real estate, third persons intervene, setting up a claim of title derived through the plaintiffs, a judgment in favor of plaintiffs, and against intervenors and defendants, although joint in form, is not so in substance, and the intervenors and defendant therefore, need not join in a writ of error. Section 9, of Texas act of March 18, 1848, (Paschal, Dig, art. 44,) allowing alien heirs nine years in which to naturalize, or to sell land inherited by them, before they shall forfeit it, is not repealed by the act of February 13, 1854, providing that aliens shall enjoy in Texas the same rights as are accorded to Americans in their country under the laws and treaties thereof, the latter expressly repealing the former only so far as inconsistent therewith. Under the former act, alien heirs by the law of whose country aliens cannot inherit real estate, obtain a defeasible title to lands in Texas good for nine years at least, and which will ripen into an indefeasible title, if, before the expiration of the nine years, the law of their country is so changed as to enable aliens to inherit. A deed executed abroad is properly proved by testimony that the grantor and subscribing witnesses reside abroad, and that the testifying witness is acquainted with the handwriting of one of the subscribing witnesses, and believes that appearing on the deed to be genuine. Erasures changing the name of the grantor from Elizabeth to Eliza are sufficiently explained by showing the identity of the two. Although, by Texas law, property purchased during marriage is *prima facie* community property, whether the conveyance be to the husband or wife, yet the presumption may be rebutted, in case of a conveyance to the wife, by proof that the consideration was nominal, and that the conveyance was intended as a gift to the wife. A power of attorney given by three persons is, by the death of two of them, revoked at least as to the two. A power of attorney to recover the interest of heirs in an estate, and, for that purpose, to do all acts that may be necessary, including the execution of conveyances, does not empower the agent to give away lands inherited by the donors of the power. A warranty deed of the grantor's "right, title, and interest in and to" certain described premises will not convey an after-acquired title, if the deed recites the title then possessed by the grantor, or contains no recital as to the character of his title. *Hanrick v. Patrick*, S. C. U. S., Nov. 29, 1886; 7 S. C. Rep. 147.

37. VENDOR AND VENDEE—*Evidence Examined—Notice of Prior Sale — Estoppel — Principal and Agent—Equity*—On the facts stated in the opinion *held*, that the appellent had no contract for the purchase of the real estate in controversy. At the time of the attempted purchase the appellant had notice of the prior sale of the premises to a third party, and, could acquire no title as against such party, where the sale was *bona fide*. A purchaser with notice is liable to the same equity, and is bound to do that which the person he represents could have been required to do but for the conveyance. *Whitehorn v. Cranz*, S. C. Neb., Nov. 24, 1886; 30 N. W. Rep. 406.

38. WILL.— *Construction — Independent Clauses — When Subsequent, will not Control—Life-Estate in Widow—When Law Will not Imply.*—Where an interest or estate is given by one clause of a will in clear and decisive terms, it cannot be taken away or cut down by inference from the terms of a subsequent clause, nor by any subsequent words not as clear and decisive as the words of the clause giving such interest or estate. The rule that, where a devise to an heir of the testator is to take effect only upon the death of testator's wife, the wife takes a life-estate by implication of law, is not applicable where the terms of the will show that the devisee is entitled to possession immediately upon the death of the testator. *Bailey v. Sanger*, S. C. Ind., Nov. 19, 1886; 9 N. E. Rep. 161.

39. —— *Construction of — Widow and Children—Trusts*—Where a testator bequeathed and devised his estate in these words: "I bequeath to my beloved wife, E, all my property, real and personal, to be solely under her care and management, in trust for the benefit of mine and her children. She may distribute it at any time, and in any manner, that she may think proper." The will was admitted to probate, and E elected to take under its provisions. *Held*, (1) that E takes the entire legal estate; that she is entitled to the use of the property for her own benefit, and is legally responsible only for the original amount, the principal; (2) that the children are entitled to equal benefits in the distribution of the devised estate; and, (3) it appearing that the property is being disposed of in a manner inconsistent with the execution of the trust, the widow will be required to make a showing regarding the property, and to give bond, failing to do which, a trustee will be appointed by the court. *Cassidy v. Hynton*, S. C. Ohio, 1886; 8 N. E. Rep. 129.

40. WILLS— *Fee — Power of Disposition — Rule in Shelley's Case—Remainder to Heirs.*—A devise of the beneficial interest to parties named, with a power to the executors to sell and convert at their discretion, for the interest of the beneficiaries, invests the executors with the fee. A devise to be secured to devisee so that she shall enjoy it during her natural life, and after her decease, then to her "right heirs" forever, is directly within the rule in Shelly's case, and vests a fee in the first taker. *Wicker v. Ray*, S. C. Ill., Nov. 13, 1886; 8 N. E. 835

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 21.—A owned a hotel called the O House. He leased it for five years to B, who named the hotel the L House. B put up his sign across the sidewalk, "L House," and painted the same on the face of the mansard roof. The hotel became well-known and a resort as the "L House," in B's hands. The lease is about to expire, and B buys another hotel in the same town and has named it the L House. He contends the sign was and is his, that his success as a hotel man gave it its value and he threatens to deface and take down the old "L House" signs from the old hotel when he moves out and intends to paint that sign on his new one. The owner of the old house objects and refuses to allow this. Whose is the better right? All in Tennessee; answer at once, urgent. * * *

QUERIES ANSWERED.

Query No. 19. [23 Cent. L. J., 251.]—Under Code of Geogia, §§ 2598, 2599, any person interested as distributee or legatee, may cite the administrator to appear before the ordinary for a settlement of his accounts; or, if the administrator chooses, he may cite all of the distributees to be present at the settlement. * * * Upon proof of such citation by a distributee, the ordinary may proceed to make an account, and settle finally, between the distributee and administrator, * * * and enforce the same by execution or by attachment for contempt. Courts of ordinary have general jurisdiction over testate and intestate estases. Under these provisions, on a citation by the executor, to one of the legatees, a non-resident of the county, has the court of ordinary jurisdiction to render judgment against said legatee for money overpaid him, by said executor, and enforce it either of the ways mentioned? G. W. A.

Answer.—The executor has no right to overpay a distributee, and any such payment made by him is a devastavit, and in contemplation of law such money is still in his possession. Consequently, the court must order the distribution as though the executor still had the money. The process referred to can be used against an executor but not against a legatee. Davis v. Bagley, 40 Ga. 181.

RECENT PUBLICATIONS.

THE AMERICAN DECISIONS containing the Cases of General Value and Authority Decided in the Courts of the Several States from the Earliest Issue of the State Reports to the Year 1869. Complied and Annotated by A. C. Freeman, Counsellor at Law, and Author of "Treatise on the Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc. Vols. LXXVII, LXXVIII, LXXIX, and LXXX. San Francisco; Bancroft-Whitney Company, Law Publishers, Booksellers and Stationers, 1886.

We have now before us four volumes of this excellent series of reports, and yet we can say very little in addition to what we have heretofore said in commendation of former volumes of the series. The compilation leaves nothing to be desired. The arrangement is in all respects excellent, and, above all, the notes of the learned editor are of themselves worth more than the cost of the volume in which they appear. These volumes bring down the decisions to the year 1861, leaving only the cases decided during eight years to complete the series which, by the plan of the work, is to close with the year 1869. It is hardly necessary to add that, in accordance with their invariable customs, the publishers have done their whole duty in these volumes, which are, in a typographical sense, perfect.

JETSAM AND FLOTSAM.

SHE was posted in law, and she would have no more nonsense, "I am a lawyer's daughter, you know, George, dear," she said, after George had proposed and been accepted, "and you wouldn't think it strange if I were to ask you to sign a little paper to the effect that we are engaged, would you?" George was too happy to think anything strange just then, and he signed the paper with a trembling hand and a bursting heart. Then she laid her ear against his middle vest button, and they were very, very happy. "Tell me, darling," George said, after a long, delicious silence, "why did you want me to sign that paper? Do you not repose implicit confidence in my love for you?" "Ah, yes," she sighed, with an infinite content, "indeed I do; but, George, dear, I have been fooled so many times."

CONVEYANCING EXTRAORDINARY. — The *Daily Court Record*, of Cleveland, Ohio, says: "One of the most common errors made by conveyancers in Ohio, is the failure to examine the wife 'separate and apart' from the husband, in conveyances, where the title to the property is in the wife. In such cases this formality is as necessary as though the husband held the title. Out of this comes the ludicrous mistake often made, of examining the husband 'separate and apart' from the wife."

A DISTINCTION WITHOUT A DIFFERENCE. — A woman recently occupied the witness stand in Belfast, Me., who was a match for the lawyers. She was a witness in the pauper case between Liberty and Palmero, and had been a pauper in the latter town. On cross-examination the attorney asked her if she was a pauper on the town. "I was a liability," said the woman. "You were a pauper," said the attorney. "I want you to understand," said the woman, firing up, "that poor people are not paupers, they are liabilities."